

Bureaucratic Politics and China's Anti-Monopoly Law

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Abstract

This article is a first attempt to investigate Chinese bureaucratic politics in-depth in order to analyze how these dynamics affect the outcome of antitrust enforcement in China. It has two major findings. First, bureaucratic politics have a powerful impact on the allocation of economic resources in China, which in turn determines how monopolies arise in the Chinese market. Second, the bureaucratic structure and political processes of decision-making shape the incentive structures of administrative agencies, thus affecting how they regulate the economic activities of various actors in the economy. The article finds that antitrust enforcement in China is a highly pluralistic process involving officials from various central ministries and local governments with overlapping functions and divergent missions and objectives. Their incentive structure and the formal and tacit rules of the Chinese bureaucracy shape the enforcement outcome of China's Anti-Monopoly Law.

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I. INTRODUCTION

Few areas of Chinese law can rival the attention that the Anti-Monopoly Law (AML) has drawn at home and abroad since its enactment on August 1, 2008.¹ In China, the AML has long been heralded as the economic constitution.² Academics and the Chinese public have high expectations that the AML will help remove regional trade barriers and stimulate the reform of state-owned firms (SOEs).³ Globalization has also triggered a surge in foreign demand for understanding the AML. The extraterritorial effects of the law allow Chinese antitrust authorities to intervene in offshore merger transactions and anti-competitive behaviours conducted overseas solely on the basis of their impact on China, i.e., sales to the Chinese market.⁴ As China is an essential part of the global market, the enforcement of the AML has begun to affect multinational companies in terms of their strategies and manner of doing business both inside and outside of China.

Existing studies typically view the adoption and implementation of the AML as a response by Chinese policymakers to a changing economic and foreign policy environment.⁵ Such a view appears to stem from the notion that the AML enforcement outcome is a result of reasoned debates among a cohesive group of Chinese policymakers who have the single, unifying goal of maximizing

¹ See Fan Longdun Fa [Antimonopoly Law] [hereinafter the AML] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), available at: http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.

² Youngjin Jung & Qian Hao, *The New Economic Constitution in China*, 24 NW. J. INT'L L. & BUS. 107, 107–08 (2003).

³ The World Bank & Development Research Center of the State Council, *China 2030: Building A Modern, Harmonious, and Creative High-Income Society*, 118–20 (2012), available at <http://www.worldbank.org/content/dam/Worldbank/document/China-2030-complete.pdf> [hereinafter World Bank Report 2030].

⁴ The AML, *supra* note 1, art. 2; See also Michael Faure & Xinzhu Zhang, *Toward An Extraterritorial Application for the Chinese Anti-Monopoly Law that Avoids Trade Conflict*, 45 GEORGE WASH. INT'L L. REV. 501, 526–28 (2013).

⁵ See, e.g., Bruce M. Owen et al., *Antitrust in China: The Problem of Incentive Compatibility*, 1 J. COMPETITION L. & ECON. 123, 126–128 (2005) (discussing the economic context in which the AML may be enforced); Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 652–71 (2010) (elaborating three economic forces that shape Chinese competition law and policy: China's current transitional stage, its market structures, and pervasive state control in the economy); Deng Fei & Gregory K. Leonard, *The Role of China's Unique Economic Characteristics in Antitrust Enforcement*, in CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 59, 60–73 (Adrian Emch & David Stallibrass eds., 2013) (outlining a number of the characteristics of the Chinese economy that could shape the enforcement of the AML).

national interest.⁶ For instance, scholars and practitioners observe that China's entry into the World Trade Organization (WTO) in 2001 suddenly revived and accelerated the effort to draft the AML and that there appeared to be "a broad consensus" at the time that China needed the AML to protect against the anticompetitive practices of multinational firms.⁷ This legislative background, coupled with the ambiguity of the objectives in the AML's text,⁸ has led many to believe that the Chinese government will use the AML as "an instrument of industrial policy" to benefit domestic firms and consumers at the expense of foreign companies.⁹ Moreover, given China's current transitional stage, distorted market structure, and pervasive state control, scholars and practitioners also predict that the AML will have limited application to Chinese domestic firms, particularly SOEs.¹⁰

For sure, the above literature significantly advances our understanding of the economic forces shaping antitrust policy in China. But the actual enforcement of the AML has yielded a far more complicated picture than the conventional analysis had predicted. Since the AML's enactment in 2008, Chinese enforcement agencies have not only applied the AML to large multinational companies, but have also frequently applied it to private domestic firms and SOEs.¹¹ Moreover, some enforcement agencies have vowed to focus their enforcement efforts in a number of areas that are dominated by large state-owned monopolies, such as those within the oil, banking, and telecommunication industries.¹²

⁶ This is similar to the rationality model some political scientists have adopted to explain Chinese politics. See KENNETH LIEBERTHAL & MICHEL OKSEBERG, *POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES* 9–14 (1988).

⁷ H. Stephen Harris Jr., *The Making of An Antitrust Law: The Pending of the Anti-Monopoly Law of the People's Republic of China*, 7 *CHI. J. INT'L L.* 169, 176–83 (2006).

⁸ Pingping Shan et al., *China's Anti-Monopoly Law: What Is the Welfare Standard*, 41 *REV. INDUS. ORG.* 31, 34–37 (2012) (discussing a number of provisions in the AML that could lead to conflicting goals and welfare standards).

⁹ See, e.g., Nathan Bush & Yue Bo, *Disentangling Industrial Policy and Competition Policy in China*, *ANTITRUST SOURCE*, 2–4 (Feb. 2011) (noting that the ambiguous text of the AML invites regulators to consider non-antitrust factors and that industrial policy is likely to prevail over antitrust policy in times of conflict); Ping Lin & Jingjing Zhao, *Merger Control Policy under China's Anti-Monopoly Law*, 41 *REV. INDUS. ORG.* 109, 111–12 (2012) (noting the growing sentiments of economic patriotism and the rising concern that foreign firms' dominance in China was among the driving factors behind the adoption of the AML and the prohibition decision of *Coca-Cola/Huiyuan*).

¹⁰ See, e.g., Zheng, *supra* note 5, at 671–720; see also Fei & Leonard, *supra* note 5, at 60–64.

¹¹ See *infra* Part IV on NDRC's recent antitrust investigations involving various economic actors.

¹² See Kazunori Takada, *China Could Target Oil Firms, Telecoms, Banks in Price Probes*, *REUTERS* (Aug. 15, 2013), <http://uk.reuters.com/article/2013/08/15/uk-china-antitrust-ndrc->

This disparity between the predictions of the existing literature and the actual enforcement pattern therefore demands an explanation.

The purpose of this Article is to provide such an explanation. It argues that the main problem with the existing literature is its failure to closely study the operation of the Chinese government bureaucracy and the incentives of the government actors involved. As Douglas North once stated: “institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.”¹³ As a form of human interaction, law enforcement is no exception; it operates within the constraints devised by a country’s specific political and economic institutions. But the existing literature focuses primarily on the economic conditions pertaining to the creation and enforcement of the AML, paying scant attention to China’s bureaucratic structure and policy-making processes. Notably, while some scholars have recently started to adopt an institutional design perspective to study AML enforcement, they have yet to situate institutional dynamics in a broader political and economic context.¹⁴

In a departure from previous analyses, this Article is the first attempt to conduct an in-depth investigation of Chinese bureaucratic politics in order to analyze how these dynamics affect the outcome of antitrust enforcement in China. It has two major findings. First, bureaucratic politics have a powerful impact on the allocation of economic resources in China, which in turn determines how monopolies arise in the Chinese market. Second, the bureaucratic structure and political processes of decision-making shape the incentive structures of administrative agencies, thus affecting how they regulate the economic activities of various actors in the economy. “The direction of causality runs from politics to economics, not the other way around,” argues Yasheng Huang, a leading expert on Chinese political economy.¹⁵ Contrary to the conventional notion that Chinese policymakers have a single, unifying goal to maximize national interests, the Article finds that

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¹³ DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (2003).

¹⁴ See generally Angela Huyue Zhang, *The Enforcement of China’s Anti-Monopoly Law: An Institutional Design Perspective*, 56 ANTITRUST BULL. 631 (2011); Yong Huang & Richean Zhiyan Li, *An Overview of Chinese Competition Policy: Between Fragmentation and Consolidation*, in CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, *supra* note 5, at 3, 6–11; Qian Hao, *The Multiple Hands: Institutional Dynamics of China’s Competition Regime*, in CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, *supra* note 5, at 15, 15–34; Jessica Su & Xiaoye Wang, *China: The Competition Law System and the Country’s Norms*, in THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES 194, 199–206 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013).

¹⁵ See YASHENG HUANG, INFLATION AND INVESTMENT CONTROL IN CHINA [xix](1996) (Although Huang’s argument is based on his observation of the political control of China’s monetary policy, it also applies strikingly well in this context).

Chinese antitrust enforcement outcomes largely result from a struggle among government agencies which decide antitrust issues in terms of the personal consequence for their stature and power. The claim here is not that Chinese AML is free of protectionism and discrimination—far from it, as will be elaborated upon in detail below. The claim is that the complexity of China’s bureaucratic structure, policy process, and incentives of government agencies leads to a far more heterogeneous enforcement outcome than the existing literature predicts.

One caveat must be entered here. The institutional approach proposed in this Article does not intend to provide a complete explanation of every antitrust decision made by Chinese administrative agencies. What it does seek to show, however, is that the pattern of China’s antitrust enforcement over the past five years can best be understood by examining the bureaucratic incentives of enforcement agencies embedded in China’s unique political system.

This Article builds upon three strands of literature. The first strand is the economic theories of organizations, particularly studies on incomplete contracting and moral hazard, which have been applied to study the design of incentives of government bureaucracy.¹⁶ The second strand is political scientists’ rich description and deep analysis of China’s bureaucratic structure and policymaking process.¹⁷ This is combined with a third strand of literature exploring Chinese economic institutions, such as studies on economic decentralization and fragmentation.¹⁸ Integrating incentive theory into the study of Chinese political economy is important because the

¹⁶ See, e.g., Jean Triole, *THE INTERNAL ORGANIZATION OF GOVERNMENT*, 46 *Oxford Economic Papers* 1 (1994) (discussing, generally, these economic theories); see generally AVINASH K. DIXIT, *THE MAKING OF ECONOMIC POLICY: A TRANSACTION-COST POLITICS PERSPECTIVE* 61–106 (1998); Richard A. Posner, *The Federal Trade Commission*, 37 *U. CHI. L. REV.* 47 (1969); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* xviii–xix (2d. ed. 1989); Richard A. Posner, *From the New Institutional Economics to Organization Economics: With Applications to Corporate Governance, Government Agencies, and Legal Institutions*, 6 *J. INSTITUTIONAL ECON.* 1,1–8 (2010).

¹⁷ See, e.g., LIEBERTHAL & OKSENBERG, *supra* note 6, at 11–19; see generally SUSAN L. SHIRK, *THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA* 92–128 (1993); see also Kenneth G. Lieberthal, *Introduction: The “Fragmented Authoritarianism” Model and Its Limitations*, in *BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA* 1–6 (Kenneth Lieberthal & David Lampton eds., 1992); Andrew C. Mertha, *“Fragmented Authoritarianism 2.0”: Political Pluralization in the Chinese Policy Process*, 200 *CHINA Q.* 995, 995–96 (2009); VICTOR SHIH, *FACTIONS AND FINANCE IN CHINA: ELITE CONFLICT AND INFLATION* 2 (2009).

¹⁸ See generally Gabriella Montinola, *Federalism, Chinese Style: the Political Basis for Economic Success in China*, 48 *WORLD POLITICS* 50 (1995); see also YASHENG HUANG, *SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA* 260–307 (2003); see also Chenggang Xu, *The Fundamental Institutions of China’s Reforms and Development*, 49 *J. ECON. LITERATURE* 1076, 1076 (2011).

incentive structure is key to understanding China's policymaking process and its market structure today. This Article also benefits from information gathered from extensive interviews with officials from various government departments and organizations, judges, and lawyers who have been closely involved in Chinese antitrust practice.¹⁹

The Article proceeds as follows. Part II begins by posing the fundamental question as to why the political decision-making process matters in the Chinese context. Part III studies the bureaucratic structure and policymaking process by exploring a peculiar phenomenon in Chinese antitrust enforcement: the coordination between Chinese enforcement agencies and other government organizations during antitrust enforcement. This is particularly evident in merger control as the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) regularly confers with other government agencies during merger review. Part IV examines the incentive structure of central enforcement agencies and seeks answers to the following questions: why does the Price Supervision and Anti-Monopoly Bureau of National Development and Reform Commission (NDRC) appear more aggressive in antitrust enforcement than the Antimonopoly and Anti-Unfair Competition Enforcement Bureau at the State Administration for Industry and Commerce (SAIC)? And what has incentivized NDRC to establish an enforcement priority of tackling price-related behaviour in certain industrial sectors? Part V examines the local enforcement agencies' enforcement records, their incentive structures, and the constraints they face during enforcement. The article's conclusion and its implications follow in Part VI.

II. WHY BUREAUCRATIC POLITICS MATTER

In his seminal paper "the Nature of the Firm," Ronald Coase posed the fundamental question of why firms exist.²⁰ In an ideal world where economic actors can effortlessly transact with each other, firms are not needed in the first place as every activity could be organized using market transactions. In the practical context, firms

¹⁹ As those individuals who agreed to be interviewed wish to remain anonymous, the Article will only identify the interviewees with very general terms of institutional affiliation.

²⁰ Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390 (1937) (hereinafter *The Nature of the Firm*). According to Coase, his interest in the nature of the firm stemmed from his observation of the communist system: "Lenin had said that the economic system in Russia would be run as one big factory. However, many economists in the West maintained that this was an impossibility. And yet there were factories in the West and some of them were extremely large. How could the views expressed by economists on the role of the pricing system and the impossibility of successful central economic planning be reconciled with the existence of management and of these apparently planned societies, that is, firms operating within our own economy?" See RONALD H. COASE, *ESSAYS ON ECONOMICS AND ECONOMISTS* 7 (1994).

exist because transacting in the market is costly; thus, a hierarchical structure, like a firm, arises to overcome these market failures and creates efficiency by reducing transaction costs.²¹ Meanwhile, the boundaries of the firm are determined by the point where internal organization is more efficient than external contracting.²²

Coase's finding that firms operate as hierarchies illuminates the governance structure that China's Communist Party (CCP) adopted to operate the Chinese economy during the early years of its rule. Modelled after the Soviet Union, the whole Chinese economy was turned into a gigantic firm in the 1950s and all economic activities were decided by command and control. As there was no market, there was no competition and no need for antitrust law. Thus, antitrust law only became necessary when China opened its economy and embarked on market reform. However, this change was only possible after the Chinese leadership successfully overcame ideological obstacles by shifting from a dogmatic emphasis on Marxism-Leninism to a pragmatic, market-oriented approach.²³ This shows that one cannot possibly sever political determinants from the study of the AML; they constitute the conditions of its very existence.

A. Law as An Incomplete Contract

If we view law as a contract—according to which a legislature specifies the terms upon which business undertakings will be subject to regulation—the contract is very incomplete. There are contingencies that are inevitably unforeseen by the law, and the law does not spell out the rules and procedures to be followed in every conceivable circumstance in precise detail.²⁴ This is especially true for antitrust law, which is fundamentally tasked with assessing the economic effects of the behaviours in question. Black letter law is ill suited for such a task as it runs the risk of making antitrust law based on the form of conduct rather than on economic effects. The responsibility of assessing behaviour thus falls on the shoulders of law enforcers, including administrative agencies and the judiciary, both of which enjoy wide discretion in assessing economic effects.

Unlike the United States, Chinese antitrust enforcement relies primarily on administrative enforcement rather than private litigation.²⁵ In a democratic society the utility of administrative agencies' law enforcement activity can be modelled as the expected public benefit gained from a successful prosecution, discounted by

²¹ See *The Nature of the Firm*, *supra* note 20, at 392.

²² See *id.* at 395.

²³ See Montinola et al., *supra* note 18, at 52.

²⁴ DIXIT, *supra* note 16, at 20; see also Chenggang Xu & Katharina Pistor, *Law Enforcement under Incomplete Law: Theory and Evidence from Financial Market Regulation*, LSE STICERD RESEARCH PAPER NO. TE442, 4 (Dec. 2002), available at <http://ssrn.com/abstract=1160987>.

²⁵ Owen et al., *supra* note 5, at 124.

the probability of successful prosecution.²⁶ Here, discounting is required as the judiciary provides an effective check on the arbitrariness of the agencies' enforcement.²⁷ But in a country like China where judicial power is often usurped by political power, judicial oversight is severely limited. In the past three decades, China has taken an unusual path by undergoing breathtaking economic transformation with little political reform.²⁸ Despite remarkable market liberalization, China remains a country ruled by a single party—the CCP. The CCP maintains supreme authority over every apparatus of the country, including the military, legislature, executive, and judiciary. Independent judiciaries provide democratic countries with the ultimate safeguard on legal interpretation and enforcement by government agencies. In China, however, the CCP maintains residual control of the law; that is, the CCP makes the final determination on how to interpret and enforce the law.²⁹

B. The Lack of Judicial Oversight

Since the AML went into effect, no defendant has appealed any administrative decision made by the enforcement agencies.³⁰ China's Administrative Litigation Law of 1989, which allows citizens to bring lawsuits against government agencies, proved to be a false hope for the establishment of rule of law in China.³¹ Haibo He, a Tsinghua law professor who has closely followed the developments of Chinese administrative law over the past decade, concluded that the institution of administrative litigation fails to achieve

²⁶ Richard A. Posner, *The Behaviour of Administrative Agencies*, 1 J. LEGAL STUD. 305, 305 (1972).

²⁷ *See id.* (“Discounting is required in order to reflect the fact that a case is less worthwhile if . . . there is a smaller chance of the agency's winning it”).

²⁸ *See* Montinola *et al.*, *supra* note 18, at 52 (Although China has achieved little progress in democratization, it is noteworthy that it has made great strides in other ways, including political decentralization, shifts in ideology, and the opening of its economy.).

²⁹ *See* ZHENG YONGNIAN, *THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION AND TRANSFORMATION* 113–14 (2010).

³⁰ Based on publicly available information, there has not been a case in which a defendant appealed an administrative decision by Chinese antitrust agencies as of the end of 2013. This is confirmed by an interview with a judge at the Supreme People's Court (Jan. 3, 2014).

³¹ *See, e.g.*, Susan Finder, *Like Throwing An Egg against a Stone: Administrative Litigation in the People's Republic of China*, 3 J. CHINESE L. 1, 1 (1989); Kevin O'Brien & Li Lianjiang, *Suing the Local State: Administrative Litigation in Rural China*, 51 CHINA J. 75, 75–76 (2005); Pei Minxin, *Citizens v. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832, 859 (1992) (concluding that China's closed political system has severely limited the efficacy of the Administrative Litigation Law for individual litigants). For more recent works (available only in Chinese), *see* Qihui Huang, Xingzheng Susong Yishen Shenpan Zhuangkuan Yanjiu [*Research on Administrative Litigation at Courts of First Instance*], 7 TSINGHUA L. J. 73 (2013); Chunhua Zhu, Xingzheng Susong Ershen Shenpan Zhuangkuan Yanjiu [*Research on the Administrative Litigation at Courts of Second Instance*], 7 TSINGHUA L. J. 86 (2013).

constitutional governance in China and only impacts social change on a severely limited level.³² Based on the national statistical data produced by the Supreme People's Court, he found a puzzling phenomenon in Chinese administrative litigation: from 1987 to 2010 the rate of plaintiff withdrawal never fell below 30%, and in some years it exceeded 50%.³³ Among those withdrawn cases, over 50% of them (over 90% from 2005 to 2010) were initiated by plaintiffs without any action by the defendants to revoke or modify the challenged administrative act.³⁴ Thus the plaintiff gained no benefits in those withdrawn cases. For instance, in 2010, 44.5% of the cases accepted by Chinese administrative courts were withdrawn, and among those cases, 92.8% were withdrawn by the plaintiffs without any action to revoke or modify by the defendants; the plaintiffs won the administrative suits in only 7.8% of those cases.³⁵

Indeed, suing the government is both risky and costly for any business in China, whether it is domestic or foreign owned. At least three things have been holding these businesses back. First, businesses could face a serious backlash when they deal with the enforcement agencies in the future. Since each of the enforcement agencies is nested within ministries that operate like a large conglomerate, businesses fear retaliation not only from those bureaus responsible for antitrust enforcement, but also from other bureaus within these powerful ministries which have regulatory control over various aspects of their businesses.³⁶ Moreover, the utility of appealing administrative decisions is further undermined by the fact that the likelihood of winning such a case is miniscule, given the predicament of Chinese administrative litigation. To make matters worse, enforcement agencies such as NDRC often artificially create a race among firms under investigation by applying generous leniency or complete immunity to those who readily admit their guilt and satisfy the agency's demands. In a recent case involving alleged minimum resale price maintenance (RPM) conduct by premium infant formula milk manufacturers, NDRC offered 100% immunity to Wyeth, Beingmate, and Meiji because they "cooperated with the investigating authorities and actively rectified the issues once they came to light," whereas those firms deemed less cooperative suffered hefty fines.³⁷ Such grants of immunity are very unusual in other

³² He Haibo, *Litigation Without A Ruling: The Predicament of Administrative Law in China*, 3 TSINGHUA CHINA L. REV. 257, 258 (2011).

³³ *Id.* at 261–63.

³⁴ *Id.* at 263–64.

³⁵ *Id.* at 263.

³⁶ Interviews with Chinese antitrust lawyers (Dec. 7 & 8, 2014). *See also* Lester Ross & Kenneth Zhou, *Administrative and Civil Litigation under the Anti-Monopoly Law*, in CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, *supra* note 5, at 317, 322–26.

³⁷ *He Sheng Yuan Deng Naifen Shengchan Qiye Weifan Fan Longduan Fa Xianzhi Jingzheng Xingwei Gong Bei Chufa 6.6873 Yi Yuan [Biostime and Other Milk Powder Manufacturers Company Were Fined RMB668.73 Million for Their Anti-Competitive Behaviour Violating the AML]*, NDRC PRESS RELEASE (Aug. 7, 2013),

jurisdictions; immunity is normally only granted to firms that volunteer to help antitrust authorities uncover secret cartels. However, NDRC was investigating RPM conduct and none of the affected manufacturers were whistleblowers.³⁸ This peculiar fining practice can therefore lead to a prisoner's dilemma for firms under investigation. If each firm anticipates that other firms will race to admit their guilt in order to receive a lower fine, then none of them will have the incentive to challenge the government's action. The high risks and costs at stake thus explain the reluctance of businesses to appeal an administrative antitrust decision.

At the same time, the Chinese judiciary has been actively engaged in drafting guidelines for private enforcement³⁹ and has handled more than 100 civil antitrust actions since the enactment of the AML.⁴⁰ While plaintiffs rarely succeed in private enforcement,⁴¹ Chinese judges have been praised for being more adept with economic reasoning and analysis.⁴² Unfortunately, it appears that their enthusiasm and dedication are limited to civil cases. While the Supreme People's Court has designated the Intellectual Property Tribunals to handle civil cases,⁴³ the Court has not issued guidelines on the judicial review of administrative cases. Generally speaking, judges at the Administrative Tribunal are in charge of hearing administrative cases.⁴⁴ However, because antitrust enforcement is often highly technical and requires substantial economic analysis,

http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807_552991.html (last visited Nov. 3, 2014) [hereinafter Milk Powder Decision].

³⁸ *See id.*

³⁹ Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (promulgated by the Supreme People's Court, Jan. 30, 2012, effective June 1, 2012) (Lawinfochina) (China).

⁴⁰ Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges*, 1 J. ANTITRUST ENFORCEMENT 247, 263 (2013).

⁴¹ *Id.* at 264 (noting only two cases in which plaintiffs have won).

⁴² *See* David S. Evans et al., *Analyzing Competition Among Internet Players: Qihoo 360 v. Tencent*, CPI ANTITRUST CHRONICLE, (May 2013). But in some early cases, judges were criticized for their lack of understanding of economics. *See, e.g.*, Angela Huyue Zhang, *Using A Sledgehammer to Crack A Nut: Why China's Anti-Monopoly Law Was Inappropriate for Renren v. Baidu*, 7 COMPETITION POL'Y INT'L 277, 294 (2011).

⁴³ *See* Zui Gao Fayuan Guanyu Xuexi He Guance Zhonghua Renming Gongheguo Fang Longduan Fa De Tongzhi [Notice by the Supreme People's Court on In-depth Studying and Implementing the Anti-Monopoly Law of the People's Republic of China] (promulgated by the Supreme People's Court, July 28, 2008), available at <http://zzzy.chinacourt.org/public/detail.php?id=582> .

⁴⁴ Telephone interview with a judge at the Intermediate People's Court (Jan. 17, 2014). According to the interviewee, in normal circumstances the Administrative Tribunal handles administrative cases. However, in some remote places where the Administrative Tribunal has not been established, the Civil Tribunal can handle administrative cases.

there are doubts about whether judges at the Administrative Tribunal are equipped with sufficient expertise to handle antitrust cases.⁴⁵

Given the predicament of administrative litigation in China, administrative agencies have effectively monopolized public enforcement in China. When law enforcement essentially becomes a political process, the study of bureaucratic structure, the political process of decision-making, and the incentives of the government actors involved all become essential to understanding the enforcement outcome of the AML.

III. BUREAUCRATIC STRUCTURE AND POLICY PROCESS

Although the CCP maintains supreme control of all strategic policymaking in China, it cannot administer the country on its own. Rather, it needs to delegate this task to the government.⁴⁶ While the CCP has permeated every level of the Chinese government, the CCP and the government are organizationally distinct.⁴⁷ In particular, the Politburo, which sits at the apex of the CCP political hierarchy, lacks the time, interest, and expertise to manage and coordinate all economic affairs in China—not to mention antitrust policy and implementation.⁴⁸ Therefore, the Politburo delegates the implementation of the AML to the State Council, which in turn delegates these tasks to various ministries. Specifically, the primary enforcement responsibilities of the AML are split among three administrative agencies: MOFCOM, NDRC, and SAIC. Specifically, MOFCOM is primarily responsible for merger control, a pre-emptive form of antitrust intervention; NDRC and SAIC are responsible for ex post antitrust enforcement. Inevitably, as authority to enforce the

⁴⁵ Telephone interview with a judge at the Supreme People's Court (Jan. 3, 2014). According to the interviewee, it hasn't been decided whether the judges in the Intellectual Property Tribunal (one of the Civil Tribunals at the Intermediate Court) or the Administrative Tribunal will handle administrative cases.

⁴⁶ Political scientists have long observed a principal-agent relationship between the CCP and the government. *See, e.g.,* Susan Shirk, *The Chinese Political System and the Political Strategy of Economic Reform, in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA, *supra* note 17, at 59, 61–62 (Shirk notes that the relationship between the CCP and the government is analogous to the relationship between the ruling party and the government bureaucracy in a democratic system; however, the crucial difference between communist and democratic systems is the political accountability of principals).

⁴⁷ Shirk, *supra* note 46, at 55.

⁴⁸ Telephone interviews with a government official at a central ministry (Jan. 8, 2014). This is consistent with an observation made by Cheng Li, an expert on Chinese leadership. *See* Cheng Li, *China's Economic Decisionmakers*, CHINA BUSINESS REV, 21 (March/Apr., 2008), available at http://www.brookings.edu/~media/research/files/articles/2008/3/03%20china%20li/03_china_li.pdf (stating that five members of the Politburo standing committee focus on non-economic issues such as institutional and legal development).

AML has been delegated to specific enforcement agencies, much of the critical activity in the shaping and implementation of the antitrust policies takes place at the bureaucratic level. To begin, I will examine MOFCOM's enforcement action since it is the most active player among the three enforcement agencies and is often viewed as being at the forefront in formulating Chinese antitrust policy.

Similar to most jurisdictions in the world, merger review is mandatory and suspensory in China. As long as a transaction meets the notification thresholds in China, parties to the transaction have the obligation to notify MOFCOM; the deal cannot be closed until MOFCOM clears the transaction.⁴⁹ Chinese merger notification thresholds are based on the sales revenue of the transacting parties.⁵⁰ These thresholds, however, are poor proxies of the competitive effects of a transaction as the sales revenue of transacting parties says little about the impact of their transaction on the Chinese market. Not surprisingly, since the AML went into effect, MOFCOM has spent most of its efforts reviewing offshore merger transactions between large multinational companies; very often those transactions have little nexus with the Chinese market.⁵¹

It should be noted China is hardly the only jurisdiction that has been beset with this problem. The Chinese merger review system is modelled after that of the European Union (EU), which has a body of competition law that is followed by many jurisdictions all over the world. But there are two features that have made the Chinese jurisdiction stand apart from all others. First, the merger notification process in China is notoriously protracted. Large multinational companies increasingly find that their merger transactions are held up by MOFCOM's clearance decisions. For instance, in *Google/Motorola*, China was the last jurisdiction to clear the

⁴⁹ Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings (promulgated by the State Council, Aug. 1, 2008, effective Aug. 1, 2008) (China).

⁵⁰ *Id.*

⁵¹ During the first five years of its enforcement, MOFCOM has reviewed a total of 643 cases. It blocked one transaction and imposed remedies on twenty mergers. The vast majority of the twenty conditional approval cases involve foreign-to-foreign transactions. For those transactions that have been unconditionally cleared, there is little public disclosure except for the names of the transacting parties of those cases. An initial analysis of those cases shows that almost half of the unconditional clearance cases involve foreign-to-foreign transactions. See MOFCOM's published decisions, available at: <http://fldj.mofcom.gov.cn/article/ztxx/>; see also MOFCOM Press Release, *MOFCOM Achieved Significant Positive Developments with Antitrust Enforcement*, MOFCOM PRESS RELEASE (Aug. 2, 2013), <http://www.mofcom.gov.cn/article/ae/ai/201308/20130800226124.shtml> (last visited Nov. 3, 2014); Fei Deng & Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, 13 THE ANTITRUST SOURCE 1, 5-7 (2013).

transaction.⁵² In fact, MOFCOM did not clear the transaction until the last day of the statutory review period.⁵³ In some cases where merging parties had not reached a desirable outcome with MOFCOM, the agency required or encouraged the parties to withdraw their filings and re-file.⁵⁴ Thus, in some cases, MOFCOM's review time significantly exceeds statutory review period.⁵⁵ Additionally, it has been observed that, unlike other large merger jurisdictions—particularly the United States and the EU—where merger review is nowadays primarily economics-based, MOFCOM often incorporates non-competition factors (particularly industrial policies) into its analyses.⁵⁶ As such, there is often suspicion among the international business community that MOFCOM applies the AML to protect domestic industries from foreign competition.⁵⁷

To be fair, MOFCOM is understaffed compared to other merger review antitrust agencies in large jurisdictions; the Anti-Monopoly Bureau, responsible for reviewing hundreds of cases each year, is staffed with only 35 people.⁵⁸ This fact alone, however, does not fully account for the delays. It is widely known among experienced practitioners that MOFCOM regularly confers with other government departments and organizations during merger review, particularly with bureaus at NDRC and the Ministry of Industry and Information Technology (MIIT) that are in charge of industrial policies, as well as local governments in certain cases.⁵⁹ The consulting process is rather opaque and MOFCOM does not discuss the information it obtains from these government agencies with the disputing parties.⁶⁰ In fact, the more government departments are involved in the consulting process, the more unpredictable it becomes; sometimes the delays are not within MOFCOM's control.⁶¹ Moreover, because MOFCOM's

⁵² See *Google Wins Chinese Approval for Motorola Bid*, BBC NEWS BUSINESS (May 21, 2012), <http://www.bbc.com/news/business-18140940>.

⁵³ *No. 25 of 2012 Announcement Regarding the Conditional Approval of the Anti-Monopoly Review of Google's Acquisition of Motorola*, MOFCOM (May 19, 2012), <http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml> (last visited Nov. 3, 2014).

⁵⁴ Deng & Huang, *supra* note 51, at 5.

⁵⁵ *Id.* (This phenomenon has been observed in a number of conditional approval cases including Western Digital/Hitachi, Glencore/Xstrata, Marubeni/Gavilon, and MediaTeck/MStar).

⁵⁶ D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J.L. & BUS. 1, 14–16 (2013)

⁵⁷ Mario Mariniello, *The Dragon Awakes: Is Chinese Competition Policy A Cause for Concern?*, BRUEGEL POLICY CONTRIBUTION, 2 (Oct. 2013), available at <http://www.bruegel.org/download/parent/799-the-dragon-awakes-is-chinese-competition-policy-a-cause-for-concern/file/1689-the-dragon-awakes-is-chinese-competition-policy-a-cause-for-concern/>.

⁵⁸ Huang & Li, *supra* note 14, at 9.

⁵⁹ *Id.* at 20.

⁶⁰ Deng & Huang, *supra* note 51, at 10.

⁶¹ Telephone interviews with a government official at a central ministry (Jan. 7, 2014).

final decisions are influenced by opinions and comments from other government agencies such as NDRC and MIIT, their decisions sometimes appear inconsistent with economic-based principles and international standards.⁶²

But if our inquiry were to stop here, it would neglect the more interesting and important questions: Why does MOFCOM need to confer with other government agencies? Isn't it in the interest of MOFCOM to consolidate its enforcement power and to make all merger decisions on its own? To understand MOFCOM's rather unusual practice of consulting other government agencies, we need to delve deeper into the Chinese bureaucratic structure and political decision-making process.

A. Management by Exception

China is a vast country. On the official organizational chart (see Figure 1 below), the Chinese bureaucracy is divided into a central government and local governments. The central government consists of the State Council and various ministries and organizations. The local government consists of four levels, including 31 provincial-level units (including 22 provinces, 4 municipalities and 5 autonomous regions), 332 cities, 2,853 counties and 40,466 townships.⁶³ The management of such a huge bureaucracy is not an easy task.

Figure 1: Official Organization of Chinese Bureaucracy

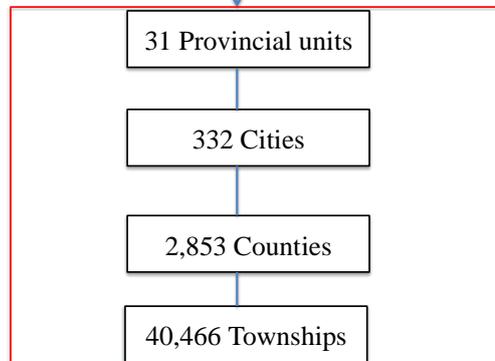
⁶² *Id.*

⁶³ *Zhonghua Renming Gong He Guo Xingzheng Quhua Tongji Biao [The Statistics of Administrative Divisions]* (As of December 31, 2011), MINISTRY OF CIV. AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, <http://qhs.mca.gov.cn/article/zlzx/qhtj/201203/20120300282479.shtml> (last visited Oct. 16, 2014) (Note that Taiwan, Hong Kong, and Macau are not included as provincial units in Figure 1).

Central Government

State Council & Ministries

Local Governments



Using a principal-agent model, Huang examines Chinese bureaucratic structure by dividing it into two levels.⁶⁴ (See Figure 2 below). The first level, the “control level,” consists of the Politburo and the State Council, which sit at the top of China’s political hierarchy.⁶⁵ The Politburo is the supreme decision-making body for all major strategic matters in the country; the State Council is responsible for transforming the Politburo’s strategic decisions into concrete policies.⁶⁶ The second level, the “controlled level,” is comprised of ministerial and provincial agencies.⁶⁷

Figure 2: A Principal-Agent Perspective on Chinese Bureaucracy⁶⁸

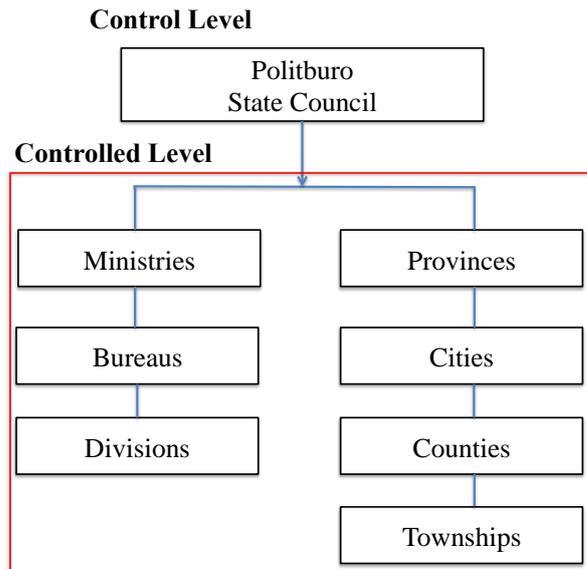
⁶⁴ See Yasheng Huang, *Managing Chinese Bureaucrats: An Institutional Economics Perspective*, 50 *POLITICAL STUDIES* 61, 66–67 (2002).

⁶⁵ *Id.* at 66.

⁶⁶ *Id.*

⁶⁷ *Id.* at 66–67.

⁶⁸ *Id.* at 68.



The logic behind such division is two-fold: first, the agencies at the control level appoint the leaders of the agencies that make up the controlled level; second, the divergence of preferences is sharpest between these two levels.⁶⁹ Each of the ministries has well-defined functions and each of the provinces has its own territorial interest;⁷⁰ thus, they often pursue their own interests at the expense of the interest of the whole system.⁷¹ Moreover, each of the ministries and provinces has relative autonomy in managing its own affairs, including the control of its own personnel.⁷² Since 1984, the CCP has applied the one-rank-down nomenklatura system, thus allowing the control level to appoint only the top level officials at the controlled level—ministers and provincial heads.⁷³ Therefore, the appointments to all but the top-level positions are controlled from within the controlled level.⁷⁴

This principal-agent perspective not only elucidates the logic behind the highly complex institutional design of China’s bureaucracy, but also illuminates the nation’s political process of decision-making.⁷⁵ When the agent acquires specialized information and develops an informational advantage over the principal, the agent can vary the quality and quantity of its efforts, particularly those that are

⁶⁹ *Id.* at 67.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 67–68.

⁷³ KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 235–37 (2004).

⁷⁴ *Id.* at 236–37.

⁷⁵ *See id.* at 233–39 (discussing the political process of decision-making and how this framework can be fit into a principal agent context); *see also* LIEBERTHAL & OKSENBERG, *supra* note 6, at 30.

unobservable by the principal.⁷⁶ Therefore, agency problems can arise when the control level (the Politburo and the State Council) delegates authority to the controlled level (the ministries and provincial governments). So how does the former induce the latter to reveal its information?

Political scientists have long observed that the Chinese government bureaucracy makes economic policy according to the decision rule of “management by exception”;⁷⁷ at each bureaucratic level, agency representatives make decisions by a rule of consensus.⁷⁸ If the representatives at one level all agree, the decision is automatically ratified at the higher level.⁷⁹ Otherwise, the decision will be referred to authorities at a higher level who will either step in to make the decision, or allow the matter to be dropped until consensus can be reached.⁸⁰

This method of decision-making has been applied to alleviate the problem of information asymmetry for the CCP leadership. To begin, Chinese ministries are organized either by function (e.g., education, culture, finance) or by economic sector (e.g., agriculture, telecommunication, transportation).⁸¹ This complex structure gives virtual (i.e. nonelectoral) representation to the economic groups and interests that the CCP leadership depends on for political support.⁸² This structure also provides some checks and balances among the agencies; each of the agencies has a particular mission and is expected to pursue it with zeal.⁸³ Therefore, when ministries and provincial leaders are called together to discuss a policy proposal, they are expected to represent and articulate the views of their units.⁸⁴ Accordingly, delegation by consensus is deemed more efficient because it relieves the top CCP leadership of the trouble of constant intervention in the policy process.⁸⁵ When consensus cannot be reached, the issue will be pushed to the top so that the superior can exploit the information advantage it obtains through different subordinate agencies.⁸⁶

⁷⁶ DIXIT, *supra* note 16, at 86–88.

⁷⁷ SHIRK, *supra* note 17, at 116 n. 1 (noting that “delegation by consensus” is “identical to what management specialists call ‘management by exception’”); *see also* LIEBERTHAL & OKSENBERG, *supra* note 6, at 23–24 (discussing how consensus building is integral to political process in the Chinese system of government).

⁷⁸ SHIRK, *supra* note 17, at 116–17.

⁷⁹ *Id.* at 116.

⁸⁰ *Id.*

⁸¹ *Id.* at 93.

⁸² *Id.* at 99.

⁸³ LIEBERTHAL & OKSENBERG, *supra* note 6, at 29.

⁸⁴ *Id.* *See also* SHIRK, *supra* note 17, at 98–99.

⁸⁵ SHIRK, *supra* note 17, at 117.

⁸⁶ *See id.* at 116–17.

One direct consequence of “management by exception” is that power becomes fragmented when it comes to policymaking and implementation.⁸⁷ The existence of massive, parallel, and interdependent bureaucracies and territorial administrations with overlapping jurisdictions further complicates this process. Kenneth Lieberthal and Michel Oksenberg, two leading experts on Chinese politics, propose a “fragmented authoritarianism” model to examine the political processes in China.⁸⁸ By closely studying Chinese economic policymaking, they found that policy made at the center is increasingly malleable to the political interests of the various ministries and provinces charged with enforcing that policy within their jurisdictions.⁸⁹ Within the energy sector, for instance, they found that a single ministry or province usually lacks sufficient clout to launch or sustain a big project or major new policy.⁹⁰ Such fragmentation of authority thus demands elaborate efforts of consensus building at each stage of the decision-making process.⁹¹

David Lampton’s studies on bargaining in Chinese politics shed similar light in this respect.⁹² He finds that bargaining among bureaucracies with similar political resources and bureaucratic ranks is so frequent and ubiquitous that policymaking becomes protracted and inefficient.⁹³ As he notes: “American sometimes see themselves as uniquely hamstrung by a ‘checks and balances system’, the Chinese decision system often is hamstrung by a complex bargaining process and the need to build a consensus.”⁹⁴ Susan Shirk also observes that because each participant at the bargaining table has veto power, policies that emerge from this system tend to be incremental rather than radical.⁹⁵ Moreover, if there are more participants involved in the decision-making process, policy consensus becomes more elusive.⁹⁶

⁸⁷ See LIEBERTHAL & OKSENBURG, *supra* note 6, at 22; see also Kenneth Lieberthal, *Introduction: The “Fragmented Authoritarianism” Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION-MAKING IN POST-MAO CHINA, *supra* note 17, at 9, 12.

⁸⁸ See generally LIEBERTHAL & OKSENBURG, *supra* note 6, at 22–31. For more recent works on fragmented authoritarianism, see Mertha, *supra* note 17, at 995–96.

⁸⁹ Mertha, *supra* note 17, at 996.

⁹⁰ See LIEBERTHAL & OKSENBURG, *supra* note 6, at 23.

⁹¹ *Id.* at 22–23.

⁹² See David M. Lampton, *A Plum for a Peach: Bargaining, Interest and Bureaucratic Politics in China*, in BUREAUCRACY, POLITICS, AND DECISION-MAKING IN POST-MAO CHINA, *supra* note 17, at 33, 34–35.

⁹³ *Id.* at 34–35, 57.

⁹⁴ *Id.* at 35.

⁹⁵ SHIRK, *supra* note 17, at 127.

⁹⁶ See *id.* (“The larger and less stable the set of participants, the more elusive is policy consensus”).

B. Consensus Building in Merger Enforcement

Due to the lack of judicial oversight, the Chinese government has effectively monopolized the whole antitrust enforcement process; this turns antitrust enforcement into a political process involving a large number of government actors, as reflected in the personnel composition of the Anti-Monopoly Commission (AMC). In 2008, the State Council established the AMC as a consulting and coordinating organization which was responsible for orchestrating the activities of the three enforcement agencies.⁹⁷ The AMC was first headed by Qishan Wang, the then-vice premier in charge of the economic bureaucratic system.⁹⁸ The heads of NDRC, SAIC, and MOFCOM, as well as a deputy secretary-general of the State Council, serve as deputy directors.⁹⁹ The AMC also consists of fourteen commissioners, including the incumbent deputy heads of various ministries and institutions under the State Council.¹⁰⁰ As a consulting and coordinating organization, the AMC does not undertake any specific enforcement activity; rather, it operates only through meetings.¹⁰¹ In practice, the commissioners rarely hold formal meetings to discuss antitrust issues,¹⁰² and the day-to-day work is assigned to MOFCOM.¹⁰³ Despite the inactivity of the AMC, it has officially bestowed authority upon various ministries and organizations to engage in antitrust affairs. Its structure of authority implies that no single ministry has the clout to unilaterally make an important antitrust policy or decision. Rather, it will have to obtain the active cooperation of other bureaucratic units who are themselves nested in distinct chains of authority. The composition of the AMC therefore suggests that enforcement of the AML is in effect a consensus-building process within the Chinese bureaucracy—similar to economic policy- and decision-making in China.

⁹⁷ The AML, *supra* note 1, art. 9.

⁹⁸ Notice of the General Office of the State Council on the Main Functions and Members of the Anti-Monopoly Commission of the State Council (promulgated by the General Office of the State Council of the People's Republic of China, July 28, 2008) (LawinfoChina), <http://www.lawinfochina.com/display.aspx?lib=law&id=7190&CGid> (last visited Nov. 3, 2014).

⁹⁹ *Id.*

¹⁰⁰ *See id.* These include: NDRC, SAIC, MOFCOM, State-Owned Assets Supervision and Administration Commission, the Ministry of Industry and Information Technology, the Ministry of Transportation, the Ministry of Finance, the Ministry of Supervision, the State Intellectual Property Office, the China Banking Regulatory Commission, the China Security Regulatory Commission, and the China Insurance Regulatory Commission, the State Electricity Regulatory Commission and the Legislative Affairs Office of the State Council.

¹⁰¹ *See* Regulations on Administration of the Establishment and Staffing of the Administrative Agencies of the State Council art. 6 (promulgated by Decree No. 227 of the State Council, Aug. 3, 1997, effective Aug. 3, 1997) 4 P.R.C. LAWS & REGS III-01-01-201 (China).

¹⁰² *See* Hao, *supra* note 14, at 23 (“[E]xcept for its issuance of the Guidelines on the Definition of the Relevant Market in 2009, the AMC itself has remained mostly invisible to the public”).

¹⁰³ The AMC has set up a secretariat office within MOFCOM.

MOFCOM's consulting practice provides a good opportunity for us to investigate the decision-making process. Based on our interviews with government officials working at central ministries, we find that government officials do not view MOFCOM's consulting practice as "unusual" at all—in fact, they believe this is the standard procedure for economic policy and for decision-making in central ministries.¹⁰⁴ They note that within the Chinese government bureaucracy, it is a customary practice for one agency in charge of economic policy- or decision-making to solicit comments and opinions from other government agencies, widely known as the "huiqian" (meaning "countersign") procedure in China.¹⁰⁵ The huiqian procedure has long been practiced among ministerial agencies, despite the absence of formal rules or procedures.¹⁰⁶ Moreover, the State Council Working Procedure Rules explicitly require that the decision-making process used by each ministry and organization underneath the State Council must be democratic and scientific.¹⁰⁷ In addition, the State Council Working Procedure Rules specify that, if the State Council needs to be notified of important matters, it will require prior extensive research and consulting, including sufficient cooperation with other relevant government departments.¹⁰⁸ In practice, government agencies that have been consulted will have a say in the policymaking process and thus the "huiqian" procedure is an important consensus-building mechanism among various government actors.¹⁰⁹ Consistent with prior studies conducted by political scientists on delegation by consensus, interviewees confirm that policy proposals or administrative decisions that have been through the "huiqian" procedure will normally be ratified by the State Council.¹¹⁰ On the other hand, if the agencies are unable to reach a consensus on a matter, the decision will be pushed up to the State Council.¹¹¹

Because large merger transactions often have an impact on the competitive structure of domestic industries, a merger review will inevitably involve the functions of other government departments, such as those responsible for industrial policy or those in charge of overseeing certain economic industry sectors. Accordingly, even if the "huiqian" procedure constrains MOFCOM's discretion to some

¹⁰⁴ Telephone interviews with government officials at central ministries (Jan. 7–8, 2014).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Guowuyuan Gongzuo Guize [The State Council Working Procedure Rules] arts. 21–25, (promulgated by the State Council, March 23, 2013) http://www.gov.cn/zwqk/2013-03/28/content_2364572.htm (last visited Nov. 3, 2014).

¹⁰⁸ *Id.* at art. 23.

¹⁰⁹ Telephone interviews with government officials at a central ministry (Jan. 7–8, 2014).

¹¹⁰ *Id.*

¹¹¹ *Id.*

extent, it also mitigates the risk that a decision will negatively impact the interests of the other government agencies at play. The “huiqian” procedure also helps MOFCOM gain insight into the industry sectors in which the mergers take place. With limited experience in merger review, the staff at MOFCOM has neither the capacity nor the sufficient expertise on various industry sectors to conduct merger review.¹¹² As MOFCOM cannot solely rely on information provided by the merging parties, the “huiqian” procedure thus becomes part of an important market investigation process. In fact, if MOFCOM makes an important merger decision without properly consulting relevant government departments, the legitimacy of its decision could be challenged internally within the government bureaucracy.¹¹³

Since the delegation by consensus mechanism maintains some checks and balances among different government agencies, can it nonetheless serve as a close substitute for the democratic system of decision-making and thus produce outcomes that will maximize national interest? The answer is probably not. As each government agency is carefully evaluating the costs and benefits of proposed decisions in terms of its own interest, they are unlikely to reach a consensus unless the decision is a Pareto improvement (i.e. it benefits at least one party and harms no one). Otherwise, the agency that has its self-interests harmed will fight fiercely against the decision. This is not necessarily the optimal outcome for the nation as a whole; to maximize national interest, the self-interests of some government actors may need to be sacrificed when the overall social benefits outweigh the costs.

Although MOFCOM has an interest in consulting other government departments, it does not necessarily incorporate all of their opinions. As each government agency is presumed to represent its own particular interests, there are often conflicts among various agencies. When conflict arises, it is then left to a “bargaining” process in which MOFCOM and other government agencies hammer out a workable solution that is deemed satisfactory to everyone.¹¹⁴ Therefore, in many circumstances compromise is a necessity because it is usually not possible to please everyone. In fact, while some government agencies have complained that MOFCOM has “delegated” too much work to the agencies by consulting them too frequently, they have also complained that the opinions they provided during consultation have not all been adopted by MOFCOM.¹¹⁵ However, because the “huiqian” procedure is a repeated game, an agency that refuses to compromise with other agencies faces potential retaliation when it wants to propose a decision or policy the next time.¹¹⁶ Therefore,

¹¹² Telephone interview with a government official at a central ministry (Jan. 7, 2014).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

anticipating that they will need MOFCOM's cooperation in the future, government agencies tend to seek compromise with MOFCOM.¹¹⁷ As to how much other agencies voice their opinions, how hard these agencies press their opinions, and how much MOFCOM ultimately incorporates their opinions into a final decision depend on the relative power of the factional networks which those government agencies represent vis-a-vis MOFCOM.¹¹⁸

IV. THE MOTIVES AND BEHAVIOR OF CENTRAL ENFORCEMENT AGENCIES

Within the realm of antitrust enforcement, NDRC is primarily responsible for price-related anti-competitive behaviour and SAIC is primarily responsible for non-price-related behaviour.¹¹⁹ Currently, NDRC and SAIC have about 15 and 8 people, respectively, in Beijing who are responsible for antitrust enforcement.¹²⁰ While staff capacity at the central ministries is low, these agencies have thousands of staff members at the local level who have authority to enforce the AML.¹²¹ In the first three years of the AML's enforcement, both agencies seemed engaged in capacity building and drafting implementing guidelines. The few cases that they have disclosed were initiated by local bureaus involving small domestic private companies, where the amount of the fine was so small that it hardly attracted any attention from the public or the legal community.¹²² As the public had high hopes that the AML would be applied to tackle the monopolistic behaviour of Chinese SOEs, complaints began to mount that the Chinese AML was only catching the flies but not the tigers.¹²³

On November 9, 2011, NDRC announced on Chinese television that it had been investigating two large telecommunication firms—China Telecom and China Unicom—for allegedly conducting price

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *Main Functions of the NDRC*, NDRC, en.ndrc.gov.cn/mfndrc/ (last visited Sept. 13, 2014); see also *Mission*, SAIC, www.saic.gov.cn/english/aboutus/Mission/index.html (last visited Sept. 13, 2014).

¹²⁰ Telephone interviews with a government official at a central ministry (Jan. 6, 2014).

¹²¹ *Id.* Notably, NDRC added 150 staff members to the local enforcement units in 2011.

¹²² The decisions disclosed by NDRC are available on its website: <http://jjs.ndrc.gov.cn>; the decisions disclosed by SAIC are available on its website: <http://www.saic.gov.cn/zwgk/gggs/jzzf/> [hereinafter SAIC's decisions].

¹²³ Jiadi Lao, *Fan Jiage Longduan Guiding Bei Zhi Da Cangying Bu Da Laohu* [The Anti-Price Monopoly Provision Had Been Alleged to Only Catch the Flies but Not the Tigers], XINGWEN WANBAO [EVENING NEWS], (Jan. 5, 2011), <http://www.antimonopolylaw.org/article/default.asp?id=2623> (last visited Nov. 3, 2014).

discrimination against rival companies.¹²⁴ This was the first antitrust investigation of Chinese SOEs and marked a turning point in Chinese antitrust enforcement. Since then, Chinese antitrust enforcement has seemingly taken a great leap forward. So far, NDRC has investigated a number of high profile cases and has imposed remedies and hefty fines on a variety of influential economic actors. These include private domestic pharmaceutical companies;¹²⁵ large multinational companies, including manufacturers of LCD panels¹²⁶ and milk powder companies;¹²⁷ SOEs owned by local governments, including the premium white liquor companies Maotai and Wuliangye;¹²⁸ and gold retailers in Shanghai.¹²⁹ Very recently, NDRC has also begun to

¹²⁴ Loretta Chao, *China Telecom, China Unicom Face Monopoly Probe*, WALL ST. J. (Nov. 9, 2011), <http://online.wsj.com/news/articles/SB10001424052970204358004577027283900972206>.

¹²⁵ *Liang Yiyao Gongsì Longduan Fufang Li Xue Ping Yuanliao Yao Shoudao Yanli Chufa* [Two Pharmaceutical Companies Have Been Severely Punished for Monopoly of the Active Pharmaceutical Ingredients of Compound Reserpine], NDRC PRESS RELEASE (Nov. 15, 2011), http://www.sdpc.gov.cn/fzgggz/jgdyfld/fjgld/201402/t20140228_588588.html (last visited Nov. 4, 2014).

¹²⁶ *Liu Jia Jingwai Qiye Shishi Yeijing Mianbang Jiage Longduan Bei Yifa Chachu* [Six Overseas Companies Investigated and Punished Legally for LCD Panel Price Monopoly], NDRC PRESS RELEASE (Jan. 17, 2013), http://www.ndrc.gov.cn/fzgggz/jgdyfld/jjszhd/201301/t20130117_523206.html (last visited Nov. 4, 2014).

¹²⁷ See Milk Powder Decision, *supra* note 37. Contrary to most media reports, not all the milk powder companies investigated are foreign companies. In fact, Biostime Inc. (Guangzhou), the company that received the largest fine, is a Chinese company. See *Matters in relation to the Administrative Punishment Decision Received by A Subsidiary of the Group And Resumption of Trading*, BAOSTIME INT'L HOLDING LTD. (Aug. 7, 2013), <http://www.hkexnews.hk/listedco/listconews/sehk/2013/0807/LTN20130807015.pdf>.

¹²⁸ *Decision in Wuliangye Case*, SICHUAN DEVELOPMENT AND REFORM COMMISSION (DRC) PRESS RELEASE (Feb. 22, 2013), <http://www.scdrc.gov.cn/dir25/159074.htm> (last visited Nov. 4, 2014) [hereinafter Wuliangye Decision]; *Decision in Maotai Case*, GUIZHOU PRICE BUREAU PRICE RELEASE (Feb. 22, 2013), <http://money.163.com/13/0222/16/8OB59OO800252G50.html> (last visited Nov. 4, 2014) [hereinafter Maotai Decision].

¹²⁹ *Shanghai Huangjing Shiping Hangye Xiehui Ji Bufen Jing Dian Shishi Jiage Longduan Xingwei Bei Yifa Chachu* [Shanghai Golden Jewelry Association and A Number of Gold Retailers Were Fined for Implementing Price Monopoly], NDRC PRESS RELEASE (Aug. 3, 2014), http://www.sdpc.gov.cn/fzgggz/jgdyfld/jjszhd/201308/t20130813_553443.html (last visited Nov. 4, 2014) [hereinafter Gold Retailer Decision]. All five gold retailers investigated by NDRC were initially controlled by the State Asset Supervision and Administration Commission (SASAC) of Huangpu District in Shanghai. In 2002 the majority control of two gold retailers, Lao Miao Huang Jing and Ya Yi Huang Jing, was transferred to Fosun, a large private domestic firm. But Shanghai SASAC maintains majority control of the other three gold retailers, including Lao Feng Xiang, Cheng Huang Zhu Bao, and Tian Bao Long Feng. One may be puzzled by the fact that the Shanghai government still retains control in competitive businesses like gold retailing; however, this is perfectly consistent with

investigate American technology firms such as Qualcomm and InterDigital.¹³⁰ These investigations have attracted heightened attention as both companies rely heavily on the Chinese market to license standard-essential patents (SEPs) to domestic firms and because these investigations appear to have been initiated by complaints from domestic firms.¹³¹

As compared to the actions of NDRC, the actions of SAIC seem to be more cautious and conservative. As of October 31, 2014, SAIC has publicly disclosed only sixteen cases on its website, all of which were investigated by local offices and involved small, local companies and insignificant fines and remedies.¹³² It wasn't until 2013 that SAIC announced that it had launched an investigation against Tetra Pak, a large Swedish packing firm, for conducting tying activity in China.¹³³ The antitrust bureau at NDRC in Beijing has a larger staff than its counterpart at SAIC, but this fact alone seems insufficient to account for the divergent patterns of enforcement. Since the responsibility for antitrust enforcement is split between NDRC and SAIC, both agencies have an interest in competing against each other for antitrust policy control.¹³⁴ But why does NDRC appear more aggressive than SAIC in bringing antitrust cases? What has motivated NDRC to bring those cases? More fundamentally, why did NDRC and SAIC divide up their responsibilities based on whether a behaviour is price-related? The answers to these questions lie in the incentive structure for government officials working at central ministries.

A. The Utility Function of Central Technocrats

Political scientists have long observed that power fragmentation in policy-making leads to an endless struggle for policy control among various levels of Chinese government agencies.¹³⁵ This is because administrative intervention in the market creates valuable resources for Chinese government officials, who can then appropriate those resources in the form of bribes (corruption) or political support

Yasheng Huang's acute observation of state-led capitalism in Shanghai. See generally YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE 175–232(2008).

¹³⁰ See *InterDigital Executives Fear Arrest, Won't Meet Chinese Antitrust Agency*, REUTERS, (Dec. 16, 2013), <http://www.reuters.com/article/2013/12/16/us-interdigital-china-idUSBRE9BF0CW20131216> (last visited Nov. 4, 2014) [hereinafter Interdigital News].

¹³¹ See *id.*

¹³² SAIC's decisions, *supra* note 122.

¹³³ Kathrin Hille, *China's Watchdog Shows They Have Teeth*, FINANCIAL TIMES, (July 5, 2013), <http://www.ft.com/cms/s/0/2310d35e-e56c-11e2-ad1a-00144feabdc0.html#axzz2rKpL2M91> (last visited Nov. 4, 2014).

¹³⁴ Zhang, *supra* note 14, at 640–45.

¹³⁵ See generally LIEBERTHAL & OKSENBERG, *supra* note 6 at 22–31; see also Lampton, *supra* note 92, at 57 (discussing how decisions are also made very slowly, and each level of the government focuses on tailoring the decision to fit its own interest).

(patronage).¹³⁶ Such opportunities for patronage therefore create fertile soil for factions to be formed. Although factions are officially prohibited within the CCP and can be organized only in secret, abundant literature on Chinese politics identifies intraparty factions as the key to understanding political power in China.¹³⁷

Due to the lack of an institutionalized mechanism for succession and clear indicators of power, Chinese leaders face constant threats to their power.¹³⁸ In order to gain support, these leaders form factions in which a loose group of lower officials have an incentive to support senior officials in any potential times of challenge.¹³⁹ Senior officials acquire their factions as they cultivate professional relationships with junior colleagues during the course of their careers.¹⁴⁰ In return for their support, senior officials reward lower officials with security or advancement.¹⁴¹ Over time, these loose networks of mutual obligation and exchange become conduits through which appointments, economic goods, and policy power are channelled.¹⁴² As elucidated by Lucian Pye: The prime basis for factions among cadres is the search for career security and the protection of power.¹⁴³

In China, all factions are formed with a single ultimate goal—power.¹⁴⁴ However, not all factions are created in the same fashion and each is endowed with different resources and memberships.¹⁴⁵ Government officials working at central ministries are often called central technocrats.¹⁴⁶ Compared with generalists such as governors at provincial government levels who are in charge of a wide range of matters, central technocrats have narrower experience in the regime and their expertise is highly specialized.¹⁴⁷ Generally speaking, central technocrats have a clear preference toward central control as it grants them more policy discretion.¹⁴⁸ Most central technocrats

¹³⁶ SHIRK, *supra* note 17, at 142.

¹³⁷ See, e.g., Andrew Nathan, *A Factionalism Model for CCP Politics*, 1973 CHINA Q. 34, 35 (1973); LUCIAN PYE, THE DYNAMICS OF FACTIONS AND CONSENSUS IN CHINESE POLITICS: A MODEL AND SOME PROPOSITIONS 6–8 (1981); JING HUANG, FACTIONALISM IN CHINESE COMMUNIST POLITICS 412 (2000). For more recent works, see Cheng Li, *One Party, Two Coalitions: Chinese Bipartisanship in the Making*, Paper Presented at the Conference on “Chinese Leadership, Politics, and Policy” (Nov. 2, 2005), available at <http://carnegieendowment.org/files/li.pdf> and SHIH, *supra* note 17, at 3–4.

¹³⁸ See SHIH, *supra* note 17, at 4.

¹³⁹ *Id.*

¹⁴⁰ *Id.* See also Nathan, *supra* note 137, at 43.

¹⁴¹ See *id.*

¹⁴² *Id.*

¹⁴³ See PYE, *supra* note 137, at 6.

¹⁴⁴ HUANG, *supra* note 137, at 412.

¹⁴⁵ SHIH, *supra* note 17, at 4.

¹⁴⁶ See *id.* at 5.

¹⁴⁷ *Id.* at 9–10.

¹⁴⁸ *Id.* at 5.

spend their whole career within the same organization and rise vertically within it, absorbing and serving its particular ideology;¹⁴⁹ their career paths thus affect their incentive structures and political preferences.¹⁵⁰ For those forward-looking central technocrats, their main utility function is to maximize their power through promoting members of their factions and enlarging resources available to agencies controlled by faction members.¹⁵¹ As depicted by Victor Shih, who closely studies the politics of Chinese monetary policy, the more control an agency has over an important policy area, the more likely it will be that that agency can capitalize on such power to accumulate administrative merits (“zhengji”), thus paving the way for the faction leaders to rise to the top level of the CCP hierarchy.¹⁵²

The above study on power fragmentation and factional politics illuminates the incentive structures of the three central antitrust enforcement agencies. While each of the three agencies clearly has an interest in competing for antitrust policy control, antitrust is not their own competitive arena. As each of them is nested within ministries that operate like large conglomerates, they have divergent responsibilities and missions. In particular, NDRC is an agency mainly in charge of macroeconomic management and industrial planning, as elaborated upon in detail below.¹⁵³ MOFCOM is primarily responsible for formulating and implementing both inbound and outbound policies of trade and investment.¹⁵⁴ It played a key role in representing China in trade deal negotiations with foreign countries—the accession into the WTO is deemed one of its crowning achievements. Not surprisingly, MOFCOM is generally seen as more liberal and pro-market than other agencies, such as NDRC, with respect to economic affairs.¹⁵⁵ As one MOFCOM official says: “If we don’t advocate for free markets, how could we promote trade—which is our main business?”¹⁵⁶ Compared with MOFCOM and NDRC, SAIC is smaller in size and has a narrower mandate, with tasks including the administration of enterprise registration, the regulation of unfair competition behaviour, and

¹⁴⁹ SHIRK, *supra* note 17, at 100.

¹⁵⁰ See SHIH, *supra* note 17, at 4–5.

¹⁵¹ *Id.* at 5.

¹⁵² See *id.* at 54.

¹⁵³ See *Main Functions of NDRC*, NDRC, <http://en.ndrc.gov.cn/mfndrc/> (last visited Sep. 9, 2014) [hereinafter *Main Functions of NDRC*].

¹⁵⁴ *Missions of MOFCOM*, MOFCOM, <http://english.mofcom.gov.cn/column/mission2010.shtml> (last visited Oct. 11, 2014).

¹⁵⁵ For instance, Hucheng Gao, MOFCOM’s incumbent minister, recently published an enthusiastic piece in *China Daily* advocating for open markets. See Hucheng Gao, *Zhongguo Yue Fazhan Jiu Yue Kaifang* [*China Becomes More Open As It Develops*], CHINA DAILY (Dec. 9, 2013), <http://www.mofcom.gov.cn/article/ae/ai/201312/20131200418351.shtml> (last visited Nov. 3, 2014).

¹⁵⁶ Telephone interview with a government official at a central ministry (Jan. 7, 2014).

consumer protection.¹⁵⁷ As each of these three agencies had the incentive to maximize its own bureaucratic interests, their divergent missions shaped their enforcement agendas during the implementation of the AML. For central technocrats working at these ministries, antitrust enforcement is simply another means to fulfilling their original mission—the ultimate goal being to gain more policy control within the scope of their designated responsibilities. To illustrate this, let’s examine NDRC’s behaviour following the enactment of the AML.

B. The Mission of NDRC

While the three central enforcement agencies enjoy the same ministerial rank, in reality NDRC stands out as the far more powerful and interventionist ministry due to its rich historical and political background. The predecessor of NDRC was the State Planning Commission (SPC). Founded in 1952, the SPC played a crucial role during those days when the Chinese economy was centrally planned.¹⁵⁸ Also known as the little State Council, the SPC was in charge of the organization of both production and distribution of major commodities, as well as the construction of significant projects.¹⁵⁹ It focused primarily on macroeconomic management and on achieving balance among the three key segments in the economy: finance, material supplies, and labour.¹⁶⁰ The SPC went through several restructurings and reorganizations over the years.¹⁶¹ The biggest restructuring took place in 2003, two years after China joined the WTO.¹⁶² The SPC merged with part of the State Economic and Trade Commission, another supra-ministerial organization that was primarily responsible for coordinating various government agencies in order to implement the SPC’s economic plans.¹⁶³ To be viewed as more compatible with China’s goal of building a market economy, the State Council also removed “planning” from the SPC’s name and replaced it with “reform and development.”

¹⁵⁷ *Mission*, SAIC, <http://www.saic.gov.cn/english/aboutus/Mission/> (last visited Oct. 11, 2014).

¹⁵⁸ LIEBERTHAL & OKSENBERG, *supra* note 6, at 64.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See Peter Martin, *The Humbling of the NDRC: China’s National Development and Reform Commission Searches for a New Role Amid Restructuring*, THE JAMESTOWN FOUNDATION (Mar. 6, 2014, 6:18 PM), http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=42057&tx_ttnews%5BbackPid%5D=758&no_cache=1#.VBZhYvldXNk.

¹⁶² See Dexter Roberts, *China’s Economic Policy Factory: The NDRC*, BLOOMBERG BUSINESSWEEK (June 20, 2013), <http://www.businessweek.com/articles/2013-06-20/chinas-economic-policy-factory-the-ndrc#p1>.

¹⁶³ See LIEBERTHAL & OKSENBERG, *supra* note 6, at 72.

Despite this name change, NDRC continued to rely on direct government intervention to solve most economic problems;¹⁶⁴ this is not surprising since promoting government intervention is directly related to NDRC's own bureaucratic interests.¹⁶⁵ In particular, the responsibilities of price control fall on the shoulders of two departments within NDRC—the Price Bureau and the Price Supervision and Anti-monopoly Bureau.¹⁶⁶ The Price Bureau is in charge of regulating the price of certain basic commodities in a number of sectors including natural gas, diesel, electricity, some medicines, and basic telecom rates.¹⁶⁷ The Price Supervision and Anti-monopoly Bureau is in charge of preventing price instability, controlling inflation, and antitrust enforcement. Currently, the Price Supervision and Anti-Monopoly Bureau is composed of 46 people, about one-third of whom are in charge of antitrust enforcement, while the rest are responsible for price supervision.¹⁶⁸

Since the 1980s, NDRC—including its price control departments—saw a significant decrease in its power.¹⁶⁹ Prices of commodities were increasingly liberalized and the power of the state to mandate prices was significantly weakened after China's entry into the WTO. But experts have observed that, since the financial crisis in 2008, NDRC has clawed its way back to dominance due in large part to Hu Jintao-Wen Jiabao's government focusing more on redistribution and welfare at the expense of further market reform.¹⁷⁰ They note that NDRC took advantage of economic conditions during the crisis and won strong support from the top Chinese leaders to take charge

¹⁶⁴ See *id.* See also Roberts, *supra* note 162.

¹⁶⁵ Barry Naughton, *Since the National People's Congress: Personnel and Programs of Economic Reform Begin to Emerge*, 41 CHINA LEADERSHIP MONITOR 1, 2 (June 2013), available at <http://www.hoover.org/sites/default/files/uploads/documents/CLM41BN.pdf>.

¹⁶⁶ *National Development and Reform Commission (NDRC)*, THE US-CHINA BUSINESS COUNCIL (2013), <http://uschina.org/sites/default/files/NDRC%2006.2013.pdf>.

¹⁶⁷ *Guojia Jiwei He Guowuyuan Youguan Bumen Jiage Mulu [Price Catalogue of the State Planning Commission and Related Ministries of the State Council]*, NDRC (July 4, 2001), <http://www.sgpi.gov.cn/laws/wj/gjdjml.htm> (last visited Nov. 4, 2014).

¹⁶⁸ Telephone interviews with government officials at a central ministry (Jan. 6, 2013).

¹⁶⁹ Barry Naughton, *Strengthening the Center, and Premier Wen Jiabao*, 21 CHINA LEADERSHIP MONITOR 1, 4–5 (2007), available at <http://media.hoover.org/sites/default/files/documents/CLM21BN.pdf>.

¹⁷⁰ Barry Naughton, *Inflation, Welfare and the Political Business Cycle*, 35 CHINA LEADERSHIP MONITOR 1, 7 (2011), available at <http://media.hoover.org/sites/default/files/documents/CLM35BN.pdf>. This is also confirmed by interviews with government officials at central ministries. Interviewees note, however, that NDRC's power may be weakened again under the current Chinese leadership who now advocate for further deepening of market reform. See Telephone interview with a government official at a central ministry (Jan. 14, 2014).

of a series of important government interventionist measures, including the battle against inflation.¹⁷¹

Given China's significant economic liberalization, one may wonder why the government continues to resort to direct price control to control inflation, rather than utilize monetary policy. For the CCP leadership, inflation is not purely an economic matter; it is also a highly sensitive political matter that has been associated repeatedly with political failures and turmoil in recent Chinese history.¹⁷² Therefore, when inflation became out of control in 2010, Chinese policymakers elevated the fight against inflation to the highest priority.¹⁷³ This provided NDRC with a golden opportunity to step back into the policymaking limelight. From December 2010, NDRC closely monitored the daily prices of primary food products and pressured merchants not to increase prices.¹⁷⁴

In 2011, NDRC started a massive campaign to mobilize merchants, chambers of commerce, and the public to “whip inflation now.”¹⁷⁵ For example, in April 2011, NDRC invited a number of private chambers of commerce to meet and pressured them not to increase prices.¹⁷⁶ As a result, 24 of 28 Federation chambers of commerce signed an undertaking to stabilize prices.¹⁷⁷ In May 2011, the Shanghai Price Bureau, a local agency of the Price Supervision and Anti-Monopoly Bureau of NDRC, fined Unilever RMB 2 million for publicly disseminating its intention to raise prices and for violating the Price Law.¹⁷⁸ The punishment followed NDRC's “informal chatting” with Unilever and a number of other leading household goods manufacturers earlier that month, during which NDRC suggested that the manufacturers refrain from increasing prices.¹⁷⁹

¹⁷¹ Naughton, *Inflation, Welfare and the Political Business Cycle*, *supra* note 170. See also Barry Naughton, *The Inflation Battle: Juggling Three Swords*, 25 CHINA LEADERSHIP MONITOR 1, 6–9 (2008), available at <http://media.hoover.org/sites/default/files/documents/CLM25BN.pdf>.

¹⁷² Naughton, *The Inflation Battle: Juggling Three Swords Leadership*, *supra* note 171, at 1–2 (associating inflation events with political turmoil such as unrest at Tiananmen Square in 1989).

¹⁷³ Naughton, *Inflation, Welfare and the Political Business Cycle*, *supra* note 170, at 2.

¹⁷⁴ *Id.* at 3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *Id.*

¹⁷⁸ Lian He Li Hua Sanbu Zhangjia Xingxi Raoluan Shichang Zhixu Shoudao Yanli Chufa [Unilever Received Harsh Penalty for Disseminating Price Increase Information and Disrupting Market Order], NDRC PRESS RELEASE (May 6, 2011), http://www.sdpc.gov.cn/fzgggz/jggl/zhd/201105/t20110506_410568.html (last visited Nov. 4, 2014).

¹⁷⁹ Fa Gai Wei Yuetan Xiangguan Qiye Shiping Rihua Ye Zhangjia Zhan Huan [NDRC Invited Relevant Enterprise for Informal Chatting, Food and Household Industries to Slow Price Increase], 21 SHIJI JINGJI BAODAO [21ST

Nonetheless, NDRC's punishment was ineffective, as Unilever reportedly raised prices in May 2011.¹⁸⁰ This time, however, there was nothing that NDRC could do as Unilever unilaterally raised prices without making a public announcement.¹⁸¹

C. Using the AML as A New Tool for Policy Control

In recent years, NDRC has started to appreciate the AML as a powerful tool for fulfilling its original mission of "price control" without appearing as though NDRC is undermining market forces. Two recent, high-profile cases illustrate this point. Both cases concerned minimum resale price maintenance (RPM) conduct by wholesale manufacturers. The first case involved Maotai and Wuliangye, two premium Chinese liquor companies that had imposed price restraints on their distributors and penalized those selling liquor at a discount (the white liquor case).¹⁸² The second case involved a number of high-end infant formula powder manufacturers that had allegedly fixed the downstream retail prices of their products and had adopted various measures to prevent discounting by retailers (the milk powder case).¹⁸³ Notably, white liquor and milk powder are two products that have been closely monitored by NDRC.¹⁸⁴ In 2008, NDRC invoked Article 30 of the Price Law, authorizing the government to temporarily intervene in certain pricing decisions in the case of emergent inflationary pressures.¹⁸⁵ For example, milk powder was one of the commodities

CENTURY ECONOMIC REPORT] (Mar. 30, 2011), <http://finance.sina.com.cn/roll/20110330/22539619505.shtml> (last visited Nov. 4, 2014).

¹⁸⁰ *Fa Gai Wei: Lian He Li Hua Cici Zhangjia Bu Weifa Bu Chufa* [NDRC: The Price Increase of Unilever This Time Doesn't Violate the Law and Hence No Penalty], XIN JING BAO [BEIJING NEWS] (May 27, 2011), <http://politics.people.com.cn/GB/1027/14751606.html> (last visited Nov. 3, 2014).

¹⁸¹ *Id.*

¹⁸² See *Wuliangye Decision*, *supra* note 128; *Maotai Decision*, *supra* note 128.

¹⁸³ See *Milk Powder Decision*, *supra* note 37.

¹⁸⁴ NDRC publishes periodic reports monitoring the prices of white liquor. See, e.g., NDRC Jia Ge Jiance Zhongxin [Price Supervision Center], *2008 Nian 10 Yue 1 Xun 36 Ge Da Zhong Chengshi Baijiu Jiage Hangqing Biao* [White Liquor Prices in 36 Large and Medium-Size Cities in October 2008] (Oct. 29, 2008), http://www.ndrc.gov.cn/fzgggz/jggl/jgsjgc/200810/t20081029_586697.html (last visited Nov. 4, 2014); see *infra* footnotes 186 and 187 on NDRC's monitoring of the prices of milk powder and white liquor.

¹⁸⁵ *Price Law of the People's Republic of China*, MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, art. 30, <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300046121.shtml> (last visited Oct. 17, 2014); see also Guojia Fa Gai Wei Guanyu Dui Bufen Zhongyao Shangping Ji Fuwu Shixing Lingshi Jiage Ganyu Cuoshi De Shishi Bangfa [The Provisional Measures by NDRC regarding the Exercise of Temporary Price Intervention of Certain Important Products and Services] (promulgated by NDRC, Jan. 15, 2008),

subject to NDRC's temporary price control and NDRC sent an emergency notice to all local provincial authorities to ensure compliance with its measures.¹⁸⁶ In 2011, on separate occasions, NDRC invited manufacturers of infant formula milk powder and premium white liquor for "informal chatting" and pressured them to refrain from increasing prices;¹⁸⁷ however, these companies continued to raise prices despite repeated warnings from NDRC.¹⁸⁸

The complaints about their RPM practices therefore provided NDRC with the perfect opportunity to rein in white liquor and infant formula powder prices. A few days after NDRC's announcement of its investigation into the infant milk powder industry, Wyeth announced that it would cooperate with NDRC's investigation, rectify its behavior immediately and lower its wholesale prices by an average of eleven percent.¹⁸⁹ Other milk powder manufacturers quickly followed suit.¹⁹⁰ In the end, Wyeth and two other infant formula manufacturers were rewarded with total immunity for proactive cooperation with NDRC, while the other three manufacturers received a fine totaling RMB668 million.¹⁹¹ From an antitrust law

http://www.gov.cn/flfg/2008-01/16/content_860257.htm (last visited Nov. 3, 2014).

¹⁸⁶ *Guojia Fagaiwei Fachu Jingji Tongzhi Yaoqiu Qieshi Jiaqiang Yingyouer Naifen Jiage Jianguan* [NDRC Sent Emergency Notice Requesting the Strengthening of the Supervision of the Prices of Infant Formula], NDRC PRESS RELEASE (Sep. 19, 2008), http://zys.ndrc.gov.cn/xwfb/200809/t20080919_236569.html (last visited Nov. 3, 2014).

¹⁸⁷ *Maotai Deng Baijiu Lun Fan Zhangjia Fa Gai Wei Zai Yuetan Yaoqiu Wending Wujia* [Maotai and Other White Liquor Companies Increase Price Again, NDRC Asks for Informal Chatting Requesting the Stabilization of Prices], GUANGZHOU RI BAO [GUANGZHOU DAILY] (Sept. 23, 2011), http://news.xinhuanet.com/fortune/2011-09/23/c_122075707.htm (last visited Nov. 4, 2014); *Meiti Cheng Fa Gai Wei Yuetan Liu Jia Yang Nai Feng* [Media Claims NDRC Informally Chatted with Six Foreign Milk Powder Manufacturers], SOUTHERN CHINA WEEKEND (May 27, 2011), <http://www.infzm.com/content/59015> (last visited Nov. 4, 2014).

¹⁸⁸ *Guan Bu Liao Lingshou Shang, 53 Du Fei Tian Maotai Zai Zhangjia 200 Yuan* [Cannot Control Retailers, 53 Degree Feitian Maotai Increases Prices by RMB200], ZHONGGUO JINGYING WANG [CHINA MANAGEMENT NET] (Sept. 26, 2011), <http://jingji.cntv.cn/20110926/108915.shtml> (last visited Nov. 4, 2014); *Hui Shi Deng Yang Nai Fen Jiti Zhangjia Zhuangjia Cheng Maoli Lu Gao Da 60%* [Wyeth and Other Foreign Milk Powder Companies Increase Prices, Experts Suggest the Gross Margin Reaches 60%], DONG FANG ZAO BAO [ORIENTAL DAILY] (July 6, 2011), <http://finance.sina.com.cn/consume/20110706/081610100864.shtml> (last visited Nov. 3, 2014).

¹⁸⁹ *Fa Gai Wei Shi Yi Hui Shi Mian Zao Zhong Fa : Shouxian Jiangjia Shuai Dui Rencuo* [NDRC Explains Why Wyeth Received Immunity Because It Was The First One to Admit Guilt and to Lower Price], 21 SHIJI JINGJI BAODAO [21ST CENTURY ECONOMIC REPORT] (Aug. 8, 2013), <http://finance.sina.com.cn/chanjing/gsnews/20130808/022816379184.shtml> (last visited Nov. 3, 2014).

¹⁹⁰ *Id.*

¹⁹¹ Milk Powder Decision, *supra* note 37.

perspective, however, it is unusual that these milk powder manufacturers would agree to lower their prices as part of the proposed remedies for a RPM case. But such an “unusual” remedy is perfectly consistent with our hypothesis that NDRC’s main goal for the investigation was to control prices; these manufacturers simply gave NDRC what it wanted.¹⁹²

Indeed, almost all of the major cases brought in the last three years by NDRC have involved basic daily consumption goods that have been subject to price monitoring, including pharmaceutical products, dairy products, liquor, broadband access, and consumer electronics.¹⁹³ The only exception is NDRC’s recent investigation into a cartel involving Shanghai gold retailers.¹⁹⁴ But a closer look at that case reveals that it was also consistent with NDRC’s mission to maintain price stability. In April 2013, a steep decline in gold prices led to a frenzy among Chinese consumers who rushed to buy gold.¹⁹⁵ Gold hoarding signals price instability and the fragility of the Chinese economy.¹⁹⁶ Therefore, NDRC’s antitrust investigation into collusive pricing among gold retailers served the function of “cooling down” gold hoarding behavior. In fact, NDRC has not shied away from making it clear that its antitrust enforcement priority is to maintain the price stability of basic commodities. In November 2013, Lu Yanchun, the Deputy Director General of the Price Supervision and Anti-Monopoly Bureau, announced that the department would continue to prioritize its enforcement efforts against price-related monopolies in six major industries including aviation, household chemicals, automobiles, telecoms, pharmaceuticals, and home appliances.¹⁹⁷

In addition to price control, NDRC has another important mission: formulating industrial policy and coordinating industry planning.¹⁹⁸ It allocates this responsibility to the Industry Coordination Bureau, a sister bureau of the Price Supervision and Anti-monopoly Bureau and

¹⁹² *Yang Nai Feng Weihe Zao Yu Fan Longduan [Why Foreign Milk Powder Manufacturers Were Investigated for Antitrust Violations]*, SOUTHERN CHINA WEEKEND (July 13, 2013), <http://www.infzm.com/content/92316> (last visited Nov. 3, 2014).

¹⁹³ *See supra* Part IV.

¹⁹⁴ *See* Gold Retailer Decision, *supra* note 129.

¹⁹⁵ *See Chinese Mothers Beat Wall Street to Force Gold Price Rebound*, SOUTH CHINA MORNING POST (May 3, 2013), <http://www.scmp.com/business/commodities/article/1228786/gold-short-sellers-lose-chinese-mothers-buying-their-daughters>.

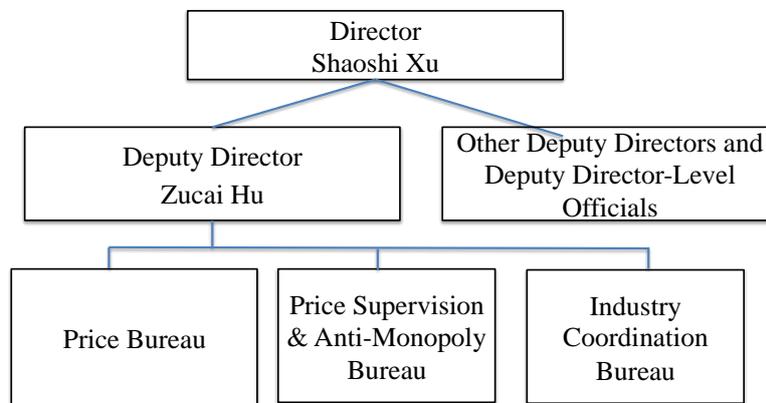
¹⁹⁶ *See China Goes Gold Crazy. Why Now?*, FORBES (Apr. 28, 2013), <http://www.forbes.com/sites/gordonchang/2013/04/28/china-goes-gold-crazy-why-now/>.

¹⁹⁷ *Guojia Jiang Zhongdian Yanguan Liu Da Hangye De Jiage Longduan Xingwei [China Will Closely Monitor Prices in Six Major Industries]*, XINHUA NET (Nov. 24, 2013), http://news.xinhuanet.com/fortune/2013-11/24/c_118270369.htm (last visited Nov. 3, 2014).

¹⁹⁸ *Main Functions of the NDRC*, *supra* note 119.

the Price Bureau. The same deputy director, Zucai Hu, simultaneously oversees these three bureaus.¹⁹⁹ (See Figure 3 below). Not surprisingly, NDRC recently initiated a number of high-profile investigations that have far-reaching implications for the competitive structure of domestic industries. These investigations include current antitrust probes into American technology firms such as Qualcomm and InterDigital.²⁰⁰ In both cases, Chinese manufacturers rely heavily on SEPs provided by the American firms, and thus antitrust investigation can provide these Chinese manufacturers with more bargaining power during negotiations for the license of SEPs.²⁰¹

Figure 3: Lines of Authority at NDRC



V. THE MOTIVES AND BEHAVIOR OF LOCAL ENFORCEMENT AGENCIES

Unlike MOFCOM, both NDRC and SAIC have massive networks of corresponding bureaus at various levels of the regional governments.²⁰² NDRC and SAIC can delegate their enforcement responsibilities to their corresponding local authorities—the Development Reform Commission (DRC) and Administration for Industry and Commerce (AIC)—and thus in theory, each agency has thousands of staff members to carry out antitrust enforcement functions.²⁰³ Based on the decisions disclosed by NDRC and SAIC,

¹⁹⁹ *See id.*

²⁰⁰ *See, e.g., Qualcomm Faces Prospect of Record Antitrust Fine in China*, REUTERS (Jan. 28, 2014), <http://www.reuters.com/article/2014/01/29/us-qualcomm-china-idUSBREA0S06020140129>.

²⁰¹ *See id.*; *see also* InterDigital News, *supra* note 130.

²⁰² While MOFCOM also has corresponding bureaus at the provincial level, those provincial bureaus are not in charge of merger review.

²⁰³ Telephone interview with a government official at a central ministry (Jan. 6, 2014). Note that some of the local corresponding offices of NDRC are

local antitrust agencies initiated and enforced the vast majority of cases. For instance, as of October 31, 2014, SAIC has publicly announced sixteen decisions, all of which were initiated and investigated by local AIC agencies with SAIC providing professional support.²⁰⁴ Considering SAIC's vast network of enforcement staff at the local level, this record is hardly impressive. In fact, authorities from only eleven provinces brought those sixteen cases, meaning that almost two-thirds of the provinces have not brought a single antitrust case in the past five years.²⁰⁵

The enforcement pattern of local DRC authorities sheds similar light on the predicament of local enforcement. While local DRC authorities seem to have brought a number of high-profile cases (e.g. the gold retailer case and the white liquor case), NDRC in Beijing in fact took the lead behind the scenes.²⁰⁶ For instance, NDRC first initiated the white liquor case, and only subsequently was enforcement authority delegated to local DRC authorities.²⁰⁷ Critics also note that the fines imposed on Maotai and Wuliangye were too lenient as these two firms were only fined 1% of annual sales in 2012.²⁰⁸ Similarly, although the decision to fine large gold retailers in Shanghai was made by Shanghai DRC, NDRC in Beijing was actively involved during the investigation.²⁰⁹ Shanghai DRC had long been aware of the collusive practices among these large gold retailers.²¹⁰ But until that point it had only tried to persuade them to cease such practices without resorting to any legal action.²¹¹ Until a tipoff to NDRC in Beijing, these gold retailers had not been investigated for AML violations.²¹² So how do we explain the apparent lack of interest in prosecuting antitrust cases demonstrated by local AIC and DRC authorities? Again, the answer lies in the

called price bureaus, but for simplicity, we refer to all local authorities of NDRC as DRCs.

²⁰⁴ See SAIC's decisions, *supra* note 122.

²⁰⁵ See *id.*

²⁰⁶ Telephone interview with a government official at a central ministry (Jan. 6, 2014).

²⁰⁷ *Id.*

²⁰⁸ *Fang Longduan Maotai Wuliangye Shou Da Fadan Fan Hengxiang Longduan Jiang Gengju Weishe Li [Maotai and Wuliangye Received Large Antitrust Fines, Anti-Horizontal Price Monopoly Will Have Greater Deterrence]*, XINGHUA WANG [XINHUA NET](Feb. 26, 2013), http://news.xinhuanet.com/fortune/2013-02/26/c_114799452.htm (last visited Nov. 3, 2014); *Zhuanjia Tan Xianzhi Zuidi Zhuang Shou Jiage: Ci Qian Dui Maotai Wuliangye Chufa Guo Qing [Expert Discusses Minimum Resale Price Maintenance, Punishment on Maotai and Wuliangye is Too Lenient]*, IBTIMES (July 3, 2013), <http://www.ibtimes.com.cn/articles/30703/20130703/384416.htm> (last visited Nov. 3, 2014).

²⁰⁹ Telephone interview with an antitrust lawyer involved in this case (Dec. 8, 2014).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

incentive structure of local enforcement agencies and the constraints these agencies face in the CCP-hierarchy.

A. Decentralized Regional Autonomy

The Chinese bureaucratic system is unitary. Local governments derive their authority from the central government.²¹³ For instance, each of the central ministries in Beijing has a corresponding bureau at the provincial level, but the provincial bureau is also a component of the provincial government.²¹⁴ Therefore, the provincial antitrust bureau simultaneously serves two principals—the provincial government and the ministry in Beijing.²¹⁵ However, within the CCP hierarchy, ministries and provincial governments are of the same bureaucratic rank.²¹⁶ Bureaucratic rank remains particularly important in China because agencies at the same rank cannot issue binding orders to each other.²¹⁷ A question then arises: When there is a conflict between the provincial government and the ministry, whose preference takes priority? For the system to operate smoothly, the Chinese government specifies that the primary line of leadership is administrative leadership, and the secondary line of leadership is professional leadership. With the exception of a few vertically integrated ministries, the provincial governments control the appointment of personnel and the budget of most of the provincial bureaus; thus, the provincial governments have the primary line of leadership over those agencies.²¹⁸ Meanwhile, the central ministries issue guidelines, instructions and non-binding directives to the provincial bureaus.²¹⁹ In the case of DRC and AIC authorities, the provincial governments have the primary line of control because they control local authorities' personnel appointments and budget.²²⁰ Therefore, the provincial governments' preference takes priority over that of NDRC and SAIC.

When does the provincial governments' preferences diverge from that of NDRC and SAIC? The answer again has to do with the bureaucratic incentive structure. Since central ministries are organized by function or by sector, they have their own often well-defined spheres of responsibility.²²¹ In comparison, provincial governments have all-encompassing responsibilities because their

²¹³ HUANG, *supra* note 15, at 28.

²¹⁴ *Id.*

²¹⁵ *See id.* at 28–32 (discussing generally how provincial bureaus simultaneously serve the provincial government and the central ministry).

²¹⁶ LIEBERTHAL, *supra* note 73, at 236 (Figure 7.1 shows that ministry and province are of equivalent rank).

²¹⁷ Susan V. Lawrence & Michael F. Martin, *Understanding China's Political System*, CONGRESSIONAL RESEARCH SERVICE 15 (Mar. 20, 2013), available at <http://fas.org/sgp/crs/row/R41007.pdf>.

²¹⁸ *See* LIEBERTHAL & OKSENBURG, *supra* note 6, at 349.

²¹⁹ *See id.* at 149.

²²⁰ Telephone interview with an AIC official (Jan. 15, 2014).

²²¹ Huang, *supra* note 64, at 66–67.

organizational structures mimic the organization of the central government.²²² Huang notes that the division between provincial bureaucrats and ministerial bureaucrats corresponds roughly to multi-task bureaucrats and single-task bureaucrats.²²³ When an agent needs to perform multiple tasks, it becomes more costly to monitor the agent and evaluate his performance directly.²²⁴ To align the interest of the principal and the agent, it is therefore more efficient to give the agent a high-powered incentive rather than rely on direct monitoring.

This theoretical prediction thus makes it easy to understand the logic behind the mechanisms that the central government applies to control provincial governments. First, the central government controls the career paths of provincial leaders using the nonmenklatura cadre management system.²²⁵ Second, the central government awards high-powered incentives to the provincial governments by expanding their financial autonomy and sharing with them the economic surplus.²²⁶ Known as fiscal decentralization, the scheme has been regarded as the cornerstone of the CCP leaders' political strategy to build support for economic reform.²²⁷ These coexisting features of highly centralized personnel control and highly decentralized regional autonomy have led economist Chenggang Xu to characterize China as a "regionally decentralized authoritarian regime."²²⁸

But decentralization is a double-edged sword. While it provides regional governments with incentives to focus on tasks that are more directly observable and measurable (e.g. GDP growth and foreign direct investment), it also induces moral hazard—for example, ignoring those tasks that are less-measurable and less-observable.²²⁹ Soon after fiscal decentralization was introduced in 1980, local protectionism began to emerge.²³⁰ As regional governments competed fiercely for economic growth within their own jurisdictions, decentralization increased the incentives as well as the range of political means through which local governments could erect trade barriers and ban imports.²³¹

The consequences of local protectionism are severe. First, it artificially carves up a large single Chinese market into smaller

²²² *Id.* at 67–68.

²²³ *Id.* at 68.

²²⁴ *See id.*

²²⁵ *Id.* at 69–74 (Noting a number of indirect mechanisms that aim at aligning the preferences of provincial leaders with those of the central government, such as cross-posting, appointment, rotation, and promotion).

²²⁶ SHIRK, *supra* note 17, at 149; *see also* Xu, *supra* note 18, at 1098–107.

²²⁷ Xu, *supra* note 18, at 1098–107.

²²⁸ *Id.*

²²⁹ *See id.* at 1129.

²³⁰ SHIRK, *supra* note 17, at 186.

²³¹ *See* Montinola et al., *supra* note 18, at 65.

segments, reducing the size of the market as well as the quality of market demand.²³² Second, it alters the industry structure of the Chinese economy. For both political and economic reasons, regional governments have incentives to impose a variety of formal and informal constraints on firms to prevent them from expanding outside of their own territories.²³³ This results in a paradoxical phenomenon. When Chinese industries are assessed on a national level, the concentration is very low because firms tend to be small and uncompetitive compared with their foreign counterparts.²³⁴ At the same time, despite the lack of competitiveness of these regional firms, monopolies can arise as regional governments erect trade barriers to prevent imports into their jurisdictions.

Over the past three decades, the central government has exerted significant effort to police the common market. In 1980, the State Council issued a regulation prohibiting regional blockades in purchasing and marketing industrial products—a piece of regulation that has often been deemed the first competition law in China.²³⁵ Since then, the central government has repeatedly intervened and issued decrees to curb regional protectionism.²³⁶ But the effects of these measures to police the common market are ambiguous and economists are still intensely debating whether regional economic fragmentation has worsened during the reform.²³⁷ In fact, the AML has devoted a chapter on “administrative monopoly” which is specifically designed to tackle issues of local protectionism.²³⁸ Unfortunately, actual enforcement against “administrative monopolies” is very weak.²³⁹ In late 2013, twelve central ministries, including MOFCOM, the Legal Affairs Office of the State Council, NDRC, and the Ministry of Finance and State Administration of Taxation, jointly released a notice on overhauling regional blockade rules for industries across the country.²⁴⁰ The fact that the removal of

²³² HUANG, *supra* note 18, at 313.

²³³ *Id.* at 271–72.

²³⁴ See World Bank Report 2030, *supra* note 3, at 112.

²³⁵ Guowuyuan Guanyu Kaizhan He Baohu Shehui Zhuyi Jingzheng De Zanxing Guiding [State Council Provisional Regulations on Developing and Protecting Socialist Competition] (promulgated by the State Council, Oct. 17, 1980, effective Oct. 17, 1980, abolished Oct. 6, 2001) (Lawinfochina) (China); see also Jung & Hao, *supra* note 2, at 127–28.

²³⁶ Xu, *supra* note 18, at 1134.

²³⁷ *Id.* at 1134–35.

²³⁸ The AML, *supra* note 1, ch. V.

²³⁹ See generally Xu Shiyong & Zhang Baisha, *Judicial and Administrative Remedies against Administrative Monopoly: Cases and Analysis*, in CHINA’S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, *supra* note 5, at 271.

²⁴⁰ See Shangwubu Shuiwu Zongju Deng Shi Er Bumeng Bushu Kaizhang Xiaochu Difang Fengsuo Dapo Hangye Longduan Gongzuo [Twelve Ministries Including MOFCOM, State Administration of Taxation Are Conducting Measures to Eradicate Regional Blockades and Eliminate Industry Monopoly], MOFCOM Press Release (Dec. 10, 2013),

regional blockade remains a high priority for the central government testifies to the persistence and severity of the problem of local protectionism.

B. The Predicament of Local Enforcement

When provincial governments engaged in a race to the bottom by erecting trade barriers and banning imports from other regions, they created market conditions conducive to the rise of monopolies at the local level. This explains local enforcement agencies' lack of interest in tackling regional monopolies, as these monopolies are deemed local champions and are important contributors to the local GDP. On the other hand, if it is local protectionism that has contributed to the lax local enforcement, one should expect local authorities to have no interest in bringing any antitrust cases at all. But that is also not true, as all of the sixteen cases announced by SAIC were initiated by local authorities. The answer to this puzzle again has to do with the bureaucratic incentive structures of AICs. Over the years, AICs have seen their power encroached upon by other government agencies, such as those in charge of product quality, intellectual property, and food safety.²⁴¹ Some local AIC officials are therefore concerned about their careers and the continuing existence of their departments.²⁴² Antitrust enforcement thus provides AIC officials with a new form of policy control and accordingly is deemed an exciting new venture.²⁴³ Notably, in some jurisdictions administrative fining is an important source of revenue for local governments who set a fining target and then evaluate the salaries and bonuses of AIC officials with regard to whether they have achieved that fining target.²⁴⁴ Such an odd compensation scheme turns local officials into high-powered incentive agents and gives them perverse incentives to aggressively fine companies before meeting the target, and then to postpone enforcement once the target is fulfilled.²⁴⁵

Another reason regional monopolies escape local enforcement has to do with the bureaucratic structure of AICs. Concerned about rampant food and pharmaceutical safety issues, the central government requested in 1998 that a number of government departments in charge of product quality (including provincial AICs) consolidate their offices within their respective provincial regions and become vertically integrated.²⁴⁶ Vertical integration means that

<http://www.mofcom.gov.cn/article/ae/ai/201312/20131200419641.shtml>
(last visited Nov. 3, 2014).

²⁴¹ Interview with a government official at a central ministry (Jan. 6, 2014).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Telephone interview with an AIC official (Jan. 15, 2014). For detailed analysis of this structural change, see Andrew C. Mertha, *China's "Soft"*

each provincial AIC exercises administrative leadership over all AIC offices within its respective region and controls their personnel and budgets.²⁴⁷ Therefore, provincial AICs have primary leadership over those agencies, and thus their preferences take priority over those of lower-level regional governments. Not surprisingly, some provincial AIC offices have incentives to encourage AIC offices to tackle small local monopolies arising at the lower regional level (i.e., the city, county, or township level). However, in 2011 the State Council removed the requirement for vertical integration of AIC offices at the provincial level, and thus some provinces again delegated primary leadership to lower regional governments.²⁴⁸ It should also be noted that there is no vertical integration with provincial DRCs; each level of the regional government has administrative leadership over the DRC office in its respective region.²⁴⁹

VI. CONCLUSION AND IMPLICATIONS

Judge Posner once famously said that “antitrust deals with what are at root economic phenomena.”²⁵⁰ This succinct statement captures the underlying logic of antitrust, which allows governments to intervene when the market fails. But when the AML is asked to deal with rampant protectionism by local governments and to tackle the monopolistic behaviour of SOEs, it then deals with what are not at root market failures, but rather government failures.²⁵¹ The idiosyncrasies of China’s antitrust law are found not only in its intentions, but also in its enforcement process. Upon opening the

Centralization: Shifting Tiao/Kuai Authority Relations, 184 CHINA Q. 791, 794–95 (2005).

²⁴⁷ *Chuixiang Chuizhi Guangli De Lenfeng [Cold Winds Blowing to Vertical Management]*, LIAOWANG [OUTLOOK WEEKLY] (Nov. 27, 2009), http://lw.xinhuanet.com/htm/content_4856.htm (last visited Nov. 3, 2014).

²⁴⁸ *Shengji Yixia Gongshang Zhijian Bumeng Gaizhi, Zeren Yu Wushamao Xiangliang [AICs and Quality Supervision Departments from Below Provincial Levels Change Structure, Responsibilities Are Tied to Official Posts]*, CHINA.COM (Nov. 8, 2011), http://www.china.com.cn/economic/txt/2011-11/08/content_23850463.htm (last visited Nov. 3, 2014).

²⁴⁹ Telephone interview with an AIC official (Jan. 15, 2014).

²⁵⁰ RICHARD A. POSNER, ANTITRUST LAW 1 (2d ed. 2001).

²⁵¹ It should be noted that it is quite common for antitrust law to have aspirations other than economic efficiency and that China is not unique in this regard. EU competition law, for instance, has been tasked with the overriding political goal of creating a single market, which does not necessarily coincide with the objective of maximizing economic efficiency. See Commission Notice on Guidelines on Vertical Restraints 2010 O.J. (C 130/1) 100 (explicitly incorporating the single market objective into the vertical guidelines and discussing potentially negative effects of vertical restraints); see also *Joined Cases 56 & 58/64, Consten & Grundig v. Commission*, 1996 E.C.R. 299. See also VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 66–68 (9th ed. 2007) (criticizing the European Commission’s mechanical application of the single market goal without properly taking into account the economic effects).

black box of the political decision-making process, we find that antitrust enforcement in China is in fact a highly pluralistic process involving officials from various central government ministries and local government agencies. The incentive structure and the formal and tacit rules of the Chinese bureaucracy shape the enforcement outcome of the AML. Posner's statement therefore demands a modification when applied to the Chinese context: there, antitrust law deals with what are at root not economic phenomena, but rather *political* phenomena.

Although the CCP clearly has a monopoly on governmental power in China that includes law enforcement, authority below the very peak of the political system is fragmented and disjointed.²⁵² When the CCP leadership delegates authority to various agencies with overlapping functions as well as competing missions and objectives, power becomes fragmented among various government actors. The endless struggle among these government actors for control of policy therefore accounts for the heterogeneity of China's seemingly paradoxical antitrust enforcement outcome. Conventional analysis of the AML therefore puts the cart before the horse in arguing that Chinese policymakers have the single objective of maximizing national interests in adopting and implementing the AML. This wrongly assumes that policy enforcement is determined by economic objectives. But protectionism is not the cause of the politicized enforcement—rather, it is its outcome. As illustrated by consensus building in merger enforcement, the incorporation of industrial policy into merger decisions is in fact the result of a protracted process that involves intense negotiation and bargaining between MOFCOM and the other government agencies that have a say in AML enforcement.

For the most part, China's antitrust enforcement is a centralized process promoted by MOFCOM, NDRC, and SAIC in Beijing. For central technocrats employed at these agencies, their main objective is to maximize their departments' policy control, which is directly tied to their factional interests and hence their career prospects. As each Chinese enforcement agency is nested within a different ministry, their divergent responsibilities and political missions shape their enforcement priorities, as amply demonstrated in the case of NDRC's attempt to use the AML as a tool to maintain price stability and fulfill industrial policy goals. At the same time, the central government's attempt to use the AML as a tool to police the internal common market seems unlikely to be successful. While local enforcement agencies clearly desire to increase their antitrust policy control, they are faced with the constraints imposed by local governments with preferences that take priority over that of the central ministries. Accordingly, unless central ministries intervene, the reliance on local enforcement is unlikely to be effective in tackling local monopolies, particularly those that are supported by strong political ties with local governments.

²⁵² LIEBERTHAL & OKSENBERG, *supra* note 6, at 8.

Although this Article is limited to China, its findings have implications for the general study of antitrust law in transitional economies. Antitrust law was first built upon a market economy where the government was only called upon to intervene when the market was imperfect. But as antitrust law globalizes and proliferates in other parts of the world, including transitional economies such as China, the functions of the law have changed. The AML was called upon not only to correct market imperfections, but also institutional imperfections such as economic fragmentation and entrenched state-owned monopolies—outcomes of deliberate political choices made by the Chinese leadership. Moreover, as antitrust law was initially enforced in democratic countries with strong judicial oversight of government actions, antitrust scholars have often neglected the complex bureaucratic process itself as an important determinant of antitrust policy outcomes. China is an excellent example that illustrates how bureaucratic politics matter for antitrust enforcement. Without effective judicial supervision, Chinese enforcement agencies have essentially monopolized the administrative enforcement of the AML and turned it into an elusive political process. This also suggests that, without addressing the fundamental problems with the underpinning institutions (e.g. lack of judicial independence), any proposal to reform AML enforcement is likely to only generate cosmetic results.

The findings in this Article also have general implications for the study of other areas of Chinese law. China is a vast country, and the enforcement of its laws often hinges upon a large, decentralized network of administrative agencies. Examination of the bureaucratic structure of administrative enforcement, the policy processes, and the incentives and constraints faced by enforcement agencies within the CCP-dominated hierarchy is therefore essential to understanding the law enforcement outcome.

Over the past three decades, China has proven to the world that it is able to carry out successful economic transformations without political reform. But the liberalization of the economy has in turn produced pressure for political reform. Without effective judicial oversight, arbitrary enforcement of the AML is bound to do more harm than good in regulating the Chinese economy. This does not bode well for further market reform in China. The enforcement of the AML is therefore another example of the predicament that the Chinese leadership faces in governing and reforming the country.